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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1912~~ 1913

No. ~~788~~ 291

INTERNATIONAL HARVESTER COMPANY OF AMERICA,
PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF KENTUCKY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

FILED JULY 8, 1912.

(23,278)

(23,278)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 703.

INTERNATIONAL HARVESTER COMPANY OF AMERICA, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF KENTUCKY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 18, 1912.

a THE COMMONWEALTH OF KENTUCKY:

The Court of Appeals.

Pleas Before the Honorable the Court of Appeals of Kentucky at the Capitol in the City of Frankfort, Kentucky, on the 28th Day of May, 1912.

INTERNATIONAL HARVESTER COMPANY OF AMERICA, Appellant,
vs.
THE COMMONWEALTH OF KENTUCKY, Appellee.

Appeal from Grayson Circuit Court.

Be it remembered that heretofore, to-wit, on the 9th day of May, 1912 the appellant, International Harvester Company of America by its attorneys filed in the office of the Clerk of the Court of Appeals of Kentucky a transcript of record in words and figures following, to-wit:—

1 NINTH JUDICIAL DISTRICT, *sct:*

Pleas Before the Hon. T. F. Burkhead, Special Judge of the Grayson Circuit Court, at a Regular Session of said Court, Continued and Held at the Court House in the City of Leitchfield, Kentucky, on April 12, 1912, to wit:—

Petition.—Transcript.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
INTERNATIONAL HARVESTER COMPANY OF AMERICA, Defendant.

Be it remembered that heretofore, to-wit: On the 24th day of July, 1911, the plaintiff by its attorneys filed in the Clerk's office of this, the Grayson Circuit Court, their petition against the defendant, the International Harvester Company of America which is in words and figures as follows, to-wit:—

Petition.

Grayson Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
INTERNATIONAL HARVESTER COMPANY OF AMERICA, Defendant.

The plaintiff, Commonwealth of Kentucky, says the defendant, International Harvester Company of America, is now and has been

for many years last past a corporation. It was incorporated under the laws of the state of Wisconsin and defendant has for many years continuously been engaged in business in this state and in Grayson County, Kentucky.

Plaintiff says that in Grayson County, Kentucky, the defendant, within one year before the filing of this petition unlawfully entered into, was a party to, and became a member of a pool, trust, combine,
agreement, confederation and understanding with the Mc-
2 Cormack Harvesting Company, the Deering Harvester Company, the Milwaukee Harvester Machine Company, the Champion Machine Company, the D. M. Osborn Company and Plano Machine Company some of the above companies were and are corporations and some were and are joint stock companies, but which are corporations and which are joint stock companies plaintiff does not know and can not state, nor does it know the names of the individuals who are members of any of the joint stock companies nor does it know in what state or states any of those that are, or were, corporations are, or, were incorporated; for the purpose of regulating, controlling and fixing the price of harvesting and farm machinery, reapers, mowers, rakes, binders, and repairs of same manufactured and produced by them, or to be manufactured and produced by them and to enhance the cost of said articles, to those desiring to purchase same, above their real value.

Plaintiff says that defendant in Grayson County, Kentucky, within one year before the filing of this petition did unlawfully and willfully while a member of, and party to an unlawful pool, trust, combination, agreement, confederation and understanding with the aforesaid companies and other companies to this plaintiff unknown, regulate, control and fix the prices of harvesting and farm machinery, reapers, mowers, rakes, binders and parts and repairs of same manufactured by said defendant and by said joint stock companies and said corporations and did enhance the price of same above their real value, and did sell and offer for sale aforesaid machinery, and repairs, in Grayson County Kentucky, within one year before the filing of this petition at a price in excess of the real value of the sais machinery, and this was done unlawfully and willfully by said company, the defendant, and in pursuance of the said unlawful pool, trust, combine, agreement, confederation and un-
3 derstanding hereinbefore set out, which existed at said time.

All in violation of the statute in such cases made and provided and against the peace and dignity of the Commonwealth of Kentucky.

Wherefore, plaintiff prays judgment against defendant for the sum of Five Thousand Dollars, for its costs herein expended and for all proper relief.

J. R. LAYMAN,
Commonwealth's Attorney of the Ninth Judicial District of Kentucky.

Notice.

Grayson Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
INTERNATIONAL HARVESTER COMPANY OF AMERICA, Defendant.

The defendant will take notice that on the 14th day of September 1911 in the Grayson Circuit Court during motion hour plaintiff will tender and ask to be filed in above styled case an amended petition, a copy of which is attached to this notice.

J. R. LAYMAN,
Commonwealth's Att'y, 9th Judicial Dist. of Ky.

Notice accepted, motion objected to.
ARTHUR M. RUTLEGE,
Att'y for Def't.
Sept. 11/11.

4 September Term, September 14th, 1912.

On Petition.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
INTERNATIONAL HARVESTER COMPANY OF AMERICA, Defendant.

Came Commonwealth's Attorney J. R. Layman, and offered to file an amended petition, to which the defendant by attorney, J. C. Graham objected.

Ordered that it be submitted thereon.

Said amended petition is in words and figures as follows, to-wit:—

Amended Petition.

Grayson Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
INTERNATIONAL HARVESTER COMPANY OF AMERICA, Defendant.

The plaintiff, Commonwealth of Kentucky, before answer filed or plea entered amends its petition herein, and adopts all the allegations of the original petition as if set out herein in words and figures, and in addition adds the following words after the words "Plano Machine Company," on first page of petition:

The International Harvester Company, a corporation, and other companies and corporations to plaintiff unknown.

And adds after the words "produced by them" on first page of petition the words:

And controlled and to be controlled by them.

And after the words "manufactured by said defendant" on the second page of petition the words:

And produced and controlled and to be produced and controlled by said defendant.

5 So that said petition, when amended shall read as follows:

The plaintiff, Commonwealth of Kentucky, says the defendant, International Harvester Company of America, is now and has been continuously for many years last past a corporation. It was incorporated under the laws of the State of Wisconsin and defendant has for many years continuously been engaged in business in this state and in Grayson County Kentucky.

Plaintiff says that in Grayson County Kentucky the defendant within one year before the filing of this petition unlawfully and willfully entered into and became a member of a pool, trust, combine, agreement, confederation, or understanding with the McCormack Harvesting Company, the Deering Harvester Company, the Milwaukee Harvester Machine Company the Champion Machine Company, the D. M. Osborne Company, the Plano Machine Company, the International Harvester Company, a corporation, and other companies and corporations to plaintiff unknown, some of above named companies are corporations and some joint stock companies but which are corporations and which joint stock companies plaintiff does not know, nor does it know who are the members of any of said joint stock companies nor does it — in what states or state those that are corporations are incorporated for the purpose of regulating, controlling and fixing the price of harvesting and farm machinery, reapers, mowers, rakes, binders, and repairs of same, manufactured and produced or to be manufactured and produced by them and controlled and to be controlled by them and to enhance the cost of said articles above their real value.

Plaintiff says said defendant did in Grayson County Kentucky within one year before the filing of this petition in pursuance of said unlawful pool, trust, combination, agreement, confederation and understanding regulate, control, and fix the price of harvesting and farm machinery, reapers, mowers, rakes, binders, and repairs

6 of same, manufactured and controlled and to be manufactured and controlled by said defendant and by aforesaid joint stock companies and by aforesaid corporations and did enhance the price of same above their real value and did offer for sale and sell aforesaid machinery in Grayson County, Kentucky within one year before the filing of this petition at a price in excess of the real value of aforesaid machinery, and this was done unlawfully and willfully by said defendant and in pursuance of the unlawful pool, trust, combine, agreement, confederation, and understanding, hereinbefore set out. All in violation of the statutes in such cases made and provided and by reason thereof defendant became indebted to plaintiff in the sum of Five Thousand Dollars.

Wherefore, plaintiff prays judgment against defendant in the sum

of Five Thousand Dollars for its costs herein expended and for all proper relief.

J. R. LAYMAN,
Commonwealth's Attorney, 9th Judicial District of Kentucky.

September 18th, 1911, statement of Corporation received from the Secretary of State, Ben L. Brunner, and filed in office.
Said statement is in words and figures as follows, to-wit:—

Statement of Corporation.

(To be filed in the office of the Secretary of State before doing business in this State.)

To the Secretary of State, Frankfort, Ky.

SIR: Notice is hereby given that the place of business for the International Harvester Company of America (a corporation of the State of Wisconsin is located at the Northwest corner of 13th
7 and Maple street- in the City of Louisville, and that J. L. Gardner of Louisville, Ky., is our agent, thereat, upon whom process may be served in any suit that may be brought against our Company within the State of Kentucky.
Done at Chicago, Illinois, this 7th day of October, 1910.
[SEAL.] R. C. HASKINS, *President.*
—— ——, *Secretary.*

This statement may be signed by President or Secretary.

Indorsed by the Secretary of the State as follows:—
"Filed and recorded October 11th, 1910, Ben. L. Brunner, Secretary of State."

Said Certificate of the Secretary of State is in words and figures as follow-, to wit:—

Commonwealth of Kentucky.

Office of the Secretary of State.

Certificate.

I, Ben L. Bruner, Secretary of the State for the Commonwealth of Kentucky, do certify that the foregoing writing has been carefully compared by me with the original record thereof, now in my official custody as Secretary of State and remaining on file in my office, and found to be a true and correct copy of Statement filed by the International Harvester Company of America, pursuant to Sec.
8 571, Ky. Statutes.
In witness whereof, I have hereunto set my hand.
Done at Frankfort this 16th day of September, 1911.

BEN L. BRUNER,
Secretary of State.

September Term, September 20th, 1911.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
INTERNATIONAL HARVESTER COMPANY OF AMERICA, Defendant.

Petition.

On motion of J. R. Layman, Commonwealth's attorney, and by agreement of counsel this prosecution is continued until the 3rd day of the next term of this Court and a subpœna will issue for the witnesses therein.

January Term, January 5th, 1912.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
INTERNATIONAL HARVESTER COMPANY OF AMERICA, Defendant.

On motion of Commonwealth's attorney this prosecution is continued until the next term of this Court.

9 April Term, April 3rd, 1912.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
INTERNATIONAL HARVESTER COMPANY OF AMERICA, Defendant.

On motion of Commonwealth's attorney this prosecution is continued until the 11th day of the present term of this Court, and a subpœna will issue for the witnesses.

April Term, April 12th, 1912.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
INTERNATIONAL HARVESTER COMPANY OF AMERICA, Defendant.

This action being called for trial, came defendant, International Harvester Company of America, and entered a plea of not guilty.

April Term, April 12th, 1912.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
INTERNATIONAL HARVESTER COMPANY OF AMERICA, Defendant.

This day this cause came on for trial, and thereupon the defendant filed herein its special plea, without waiving the plea of not guilty.

And thereupon came the Commonwealth and filed a demurrer to the first paragraph of said plea, and the Court being advised, it is ordered that the same be and it is hereby sustained; and the defendant declining further to amend said first paragraph of said plea, the said first paragraph of said plea is hereby dismissed; to which the defendant excepts.

And thereupon came the Commonwealth and filed a reply to the second and third paragraphs of said plea. And thereupon came the defendant and filed a demurrer to each paragraph of said reply. And the Court being advised of said demurrer, overrules the same; to which the defendant excepted.

And thereupon this cause came on for trial. By consent of plaintiff and defendant there was read to the jury all of the testimony contained on the stenographic report of testimony given in the case of Commonwealth of Kentucky v. International Harvester Company of America, tried at the August, 1911, term of the Bullitt Circuit Court, and also the testimony contained in the bill of exceptions filed in said cause; it being stipulated that all objections and exceptions taken to said testimony by either party, as set forth in said transcript and bill of exceptions, are now taken and made by the respective parties hereto. And the defendant, for the purposes of this case, admitted that it had, within the period set out in the petition, sold goods, wares and merchandise of the character described in the petition, in the County of Grayson.

And thereupon the plaintiff offered the same instructions as are set out in said bill of exceptions as offered by the plaintiff; and the defendant offered the same instructions as are set out in said bill of exceptions as offered by the defendant; and the Court gave the same instructions as are set out in said bill of exceptions; and the plaintiff and the defendant made the same objections and exceptions to the giving and refusing of instructions as are set out in said bill of exceptions.

11 And thereupon this cause was submitted to the following jury: Marvin Basham, Geo. McClure, Oscar Higgs, Ed Shain, Ed F. Wallace, W. D. Armes, John Stone, Billie Lile, Jr., Miley Golladay, E. F. Aubrey, Will Hodges and Minor Butler, who were duly sworn as required by law. After having been accepted by plaintiff and defendant to try this case, and after hearing the evidence and receiving the instructions of the Court, and the jury having retired, returned the following verdict:

We the jury find defendant guilty as charged in the petition and fix a fine at $1500.00.

OSCAR HIGGS, *Foreman.*

And in consideration thereof it is now adjudged that the Commonwealth of Kentucky recover of the defendant, the International Harvester Company of America, the sum of $1500, with interest from date until paid, and its costs herein expended.

And thereupon came the International Harvester Company of America and filed a motion and grounds for a new trial herein, identical with the motion and grounds for new trial set out in said

bill of exceptions above mentioned; and the Court being advised, now orders the said motion to be and it is hereby overruled; to which the defendant excepts; and on motion of the defendant an appeal is granted to it from the judgment herein to the Court of Appeals upon condition that the record herein shall be filed in the Court of Appeals within sixty days from the date hereof, and in lieu of bill of exceptions it was agreed between the plaintiff and defendant that the said transcript of testimony and the said bill of exceptions above referred to, should be taken as the transcript of testimony and bill of exceptions in this case, supplemented by the admission made by the defendant as above set forth.

12 Said instructions as given by the court are in words and figures as follows to-wit:—

Instructions.

No. 1. The Court instructs the jury that if they believe from the evidence to the exclusion of a reasonable doubt that the defendant, the International Harvester Company of America, before the filing of the petition herein entered into or became a member of a pool, trust, combine, agreement, confederation or understanding with the McCormack Harvesting Company, Deering Harvester Company, Milwaukee Machine Company, Champion Machine Company, the D. M. Osborne Company, The Plano Machine Company or any of said companies for the purpose of regulating, controlling, or fixing the price of Harvesting or farm machinery, reapers, mowers, rakes, binders or repairs for same manufactured or produced or to be manufactured or produced by them or any of them, and that the purpose and effect of said pool, trust, combine, agreement, confederation or understanding, if any, was to enhance the price of said harvesting or farm machinery, reapers, mowers, rakes, binders or repairs of same or any of them above their real value, and if the jury further believe from the evidence beyond a reasonable doubt that the defendant company in pursuance of or while a member of or party to or any way interested in such pool, trust, combine, agreement, confederation or understanding in Grayson County and within one year before the filing of this petition, to wit: one year before July 24th, 1911, and under substantially the same market conditions that existed before the advance if any, in the price of said machinery sold any harvesting or farm machinery, reapers, mowers, rakes, binders or repairs of same or entered into any contract with any agent which contemplated the sale of any said harvesting or farm machinery, reapers, mowers, binders, rakes, and repairs for

13 same at more than their real value, then in that event the jury should find the defendant guilty and fix its punishment at a fine of not less than $500.00, and not more than $5000.00 in the discretion of the jury.

No. 2. Although you may believe from the evidence to the exclusion of a reasonable doubt that the defendant entered into or became a member of a pool, trust, or combine as set out in instruction No. 1, and that within twelve months before July 21st, 1911,

the defendant while a member of such pool, trust, or combine sold some of the farming or harvesting implements or machinery mentioned in instruction No. 1, in Grayson County either itself or through its agents at a greater price than said machinery sold at before defendant became a member of such pool, trust, or combine, yet, if you believe from the evidence that the enhancement of the price of said machinery was due solely to the increased cost of labor or material, if any, in producing said machinery you should find the defendant not guilty.

No. 3. If you have a reasonable doubt of the defendant having been proven to be guilty you should find it not guilty.

Special Plea filed herein, April 12th, 1912, is as follows, to-wit:—

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
INTERNATIONAL HARVESTER COMPANY OF AMERICA, Defendant.

Special Plea.

Not waiving its plea of not guilty herein, the International Harvester Company of America, still insists upon its demurrer herein and now says:

1. That the act of March 21, 1906, is violative of the Constitution of the United States, and especially of the Fourteenth Amendment thereof, in that it denies to the defendant the equal protection [illegible] of the law.

2. That to construe and enforce the Act of May 20, 1890, Section 198 of the Constitution of Kentucky, and the Act of March 21, 1906, so as to make the sale of an article above its real value or below its real value a penal offense, would be violative of the Constitution of the United States and particularly the Fourteenth Amendment thereof, in that such would not be due process of law.

3. That the design of the Legislature of Kentucky, in passing the Act of March 21, 1906, and the necessary effect thereof, and the purpose to be accomplished thereby, were to enable the farmers of Kentucky, to combine among themselves to place the products described in the Act of 1906 in the hands of one person or corporation with the power in such person or corporation to fix the price and control the sale thereof, and thereby increase the prices of such farm products beyond the price that could be obtained without concerted action and under free competition; that since the passage of said Act a large number of corporations and combinations have been formed under the laws of the State of Kentucky, whose object and purpose were to enable those associated in the combination or corporation to turn over to the combination or corporation a product owned by the associates, of the character described in the Act of 1906, giving to the combination or corporation irrevocable power to sell the same; that such object and purpose have been carried out and, in many instances, the contracts of the owners of the said product with the said combination or corporation, have fixed the minimum price below which such product could not be sold, and thereby

the price of such product has been largely increased in the State of Kentucky and elsewhere.

15 The defendant says that the result of the formation of these combinations and corporations has been to enable the owners of products described in the Act of 1906 to obtain, and they have obtained, a price therefor greatly in excess of what was being paid therefor prior to the Act of 1906 and prior to the formation of said several combinations or corporations, and greatly in excess of the prices obtainable therefor without the aid of such combinations or corporations.

The defendant says that since the passage of said Act of 1906 no indictment has ever been found nor penal action brought in any Court in the Commonwealth of Kentucky against any combination or corporation formed for the purpose and with the effects aforesaid, and coming within the terms of the Act of 1906; but defendant avers that many indictments have been found, and many penal actions have been brought, against combinations and corporations, selling in Kentucky products not included in the terms of said Act of 1906, for alleged violations of the Anti-trust Laws of the State of Kentucky.

And so it is that the defendant says that the purpose and effect of the Act of 1906 above referred to as affecting the Anti-trust Laws of the State of Kentucky, have been to allow combinations and corporations to be formed, of the character described in the Act of 1906, and to allow them to conduct their operations and to fix the prices of such products; and such combinations and corporations have been formed for the express purpose of increasing the prices of farm products by means of such combinations and corporations; and such combinations and corporations have so conducted their operations, and have fixed prices upon the products which they were formed to control without regard to prices thereof existing prior to the formation of such combinations and corporations, and the prices

16 of said farm products have been thereby increased, without any interference on the part of the public authorities of the Commonwealth of Kentucky; that during the same period the public authorities of the State of Kentucky have continued to prosecute combinations and corporations which are alleged to be combinations or corporations to control the prices and to exact more than the reasonable value or "real value" of products not within the terms of said Act of 1906. And the defendant says that the result of the passage of said Act of 1906, and the method of the enforcement of the Anti-trust laws of the State of Kentucky as affected thereby, have been to deprive this defendant and others similarly situated and outside the terms of the Act of 1906, of the equal protection of the laws, contrary to the provisions of the Constitution of the United States, and particularly the Fourteenth Amendment thereof.

Wherefore defendant prays to be herein dismissed.

J. C. GRAHAM,
L. A. FAUREST,
A. M. RUTLEGE,
HUMPHREY & HUMPHREY,
Attorneys for Defendant.

April 12th, 1912.

Came plaintiff by attorney and filed demurrer to the Special plea. Said demurrer is in words and figures as follows, to-wit:—

Demurrer.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
INTERNATIONAL HARVESTER COMPANY OF AMERICA, Defendant.

The plaintiff demurs to the first paragraph of the Special plea of the defendant herein, this day filed, because it says that
17 said special plea does not state facts sufficient to constitute a defense herein.

J. R. LAYMAN,
Attorney for Plaintiff.

April 12, 1912.
Filed in open Court.

Attest,
MIKE PRYOR, *C. G. C. C.*

Reply to Special Plea of defendant is in words and figures as follows, to-wit:—

Reply to Special Plea.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
INTERNATIONAL HARVESTER COMPANY OF AMERICA, Defendant.

Plaintiff, for reply to second Paragraph of Special Plea of defendant, denies that the act of May 20, 1890, or Section 198 of the Constitution of Kentucky, or the Act of March 21, 1906, either separately or together have been so construed in Kentucky as to make the sale of an article above its real value or below its real value a penal offense. Plaintiff says that under the laws of this Commonwealth it is only an offense under the Acts above mentioned, or the section of the Constitution above mentioned, to form a trust pool, or combination for the purpose of fixing or maintaining the prices of products or commodities and selling same above their real value or below their real value.

For reply to Paragraph Three of Special Plea, plaintiff denies that the design of the Legislature of Kentucky in passing the Act of March 21, 1906, or the necessary effect thereof, or the pur-
18 pose to be accomplished thereby, was to enable the farmers of Kentucky to combine among themselves to place the product described in the Act of 1906 in the hands of one person or corporation, with the power in such person or corporation to fix the price or control the sale thereof, and thereby increase the prices of such farm products beyond the price that could be obtained without concerted action or under free competition; denies that since the passage of said Act a large number of corporations or combinations have been formed under the laws of the State of Kentucky, whose object

or purpose was to enable those associated in the combination or corporation to turn over to the combination or corporation a product owned by the associates of the character described in the Act of 1906, giving to the combination or corporation irrevocable power to sell the same, or that such object or purpose has been carried out, or in many instances the contracts of the owners of the said product with the said combination or corporation have fixed the minimum price below which such product could not be sold, or thereby the price of such product has been largely increased in the State of Kentucky or elsewhere.

Plaintiff says the purpose of the Act of March 21, 1906, was to enable the producers of the articles mentioned in said Act, by pool, and combination, to obtain a better price than they could get if they sold their crops separately and as distinct individuals.

Plaintiff says that in penal actions pending in its name in the Grayson Circuit Court its knowledge is only that of the Commonwealth Attorney of the Judicial district of which Grayson County is part, which is in the 9th Judicial district and the County
19 Attorney of Grayson County; that there are in the State of Kentucky one hundred and twenty counties, which are divided into more than thirty judicial or circuit court districts, and that the knowledge of the Commonwealth Attorney of the judicial district of which Grayson County is part, and the knowledge of the County Attorney of Grayson County, do not extend to the transactions occurring in other counties, so far as the Commonwealth Attorney is concerned than the counties in the district in which he is Commonwealth Attorney, of which there are four and as to the County Attorney of Grayson County, only as to said County, and their knowledge being the only knowledge which plaintiff has as to the matter immediately hereinafter set forth, it denies knowledge or information sufficient to form a belief that since the passage of said Act of 1906 no indictment has ever been found or penal action brought in any court in the Commonwealth of Kentucky against any combination or corporation formed for the purpose or with the effects aforesaid, or coming within the terms of the Act of 1906, but plaintiff further says that the courts of *the Courts of* the judicial district of which Grayson County is part, and the Circuit Court of Grayson County, has jurisdiction to prosecute any offense committed in said County, and the Commonwealth Attorney of said judicial district has authority to institute prosecutions in any county of his district against any combination or corporation guilty of violating the Act of 1890 and the amendment thereto of March 21, 1906, and if any of the employés, agents, or attorneys of defendant has knowledge of any violation of the Act of 1890, as amended by the Act of March 21, 1906, in any county in the 9th judicial district, if said knowledge is communicated to the Commonwealth Attorney of this judicial district of which Grayson County is part, or to the County Attorney of Grayson County, then proceedings will be instituted against the combination or corporation so offending.

20 Plaintiff admits that many penal actions have been brought against combinations and corporations in Kentucky,

especially this defendant, for violating the Act of 1890, as amended by the Act of March 21, 1906, and said prosecutions will be continued until said combinations and corporations and this defendant comply with the laws of Kentucky.

Plaintiff denies that the purpose or effect of the Act of 1906 (which plaintiff says is an amendment to the Act of 1890) has been to allow combinations or corporations to be formed of the character described in the Act of 1906, and to allow them to conduct their operations or fix the prices of such products or any at a price above the real value of such product, or depreciate the price of such products or any below their real value.

Plaintiff admits combinations and corporations have been formed, the result of which has been the increasing of the price of farm products, but says that in no case has the price of said farm products been increased above their real value, so far as plaintiff knows, and if such combinations have been formed for the purpose of increasing the price of farm or any products mentioned in the Act of 1906 above their real value, and such has been the result of said combination, then such combination is in violation of law and will be prosecuted when called to the attention of the officers whose duty it is to prosecute such violations, and defendant is called upon by its officers, agents, or attorneys, if it has such knowledge, to present it to the proper authorities, who are well known to defendant, its agents, employés and attorneys.

Plaintiff admits that its officers who are authorized so to do have prosecuted combinations and corporations which have been formed for and which have controlled the prices of goods, wares, and merchandise, which are sold in the State of Kentucky at prices in
21 excess of their real value, and will so continue to do, and this irrespective of the fact whether or not such combinations or corporations come within the Act of March 21, 1906.

Plaintiff denies that the Act of March 21, 1906, or the results arising from the passage of said Act, or the method of the enforcement of the anti-trust laws of the State of Kentucky, as effected thereby, have been to deprive this defendant, or others similarly situated and outside the terms of the Act of 1906 of the equal protection of the laws contrary to the provisions of the Constitution of the United States, or particularly the Fourteenth Amendment thereof.

Plaintiff further says there are no anti-trust laws in the State of Kentucky; that under the laws of the State of Kentucky, trusts, pools, and combinations may be formed and are legal, and this has been the law continuously for many years, and covering the period of time embraced by this prosecution.

Plaintiff prays as in its petition.

J. R. LAYMAN,
Attorney for Plaintiff.

April 12, 1912, filed in open Court.

Attest,
MIKE PRYOR, *C. G. C. C.*

Demurrer to the reply of the plaintiffs to the Special Plea. Said demurrer is in words and figures as follows, to-wit:—

Demurrer.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
INTERNATIONAL HARVESTER COMPANY OF AMERICA, Defendant.

The defendant demurs to the first and second paragraph of the reply of the plaintiff to the second and third paragraphs of its special plea herein, because it says that said reply does not state facts sufficient to support the cause of action.

22 Wherefore the defendant prays etc.

J. C. GRAHAM,
L. A. FAUREST,
A. M. RUTLEGE,
HUMPHREY & HUMPHREY,
Attorneys for Defendant.

April 12, 1912.
Filed in open Court.

Attest,
MIKE PRYOR, *C. G. C. C.*

23 April 30th, 1912.

Came defendant, International Harvester Company of America and tendered Supersedeas Bond herein and power of attorney. Said Supersedeas Bond is in words and figures as follows, to-wit:

Bond.

THE COMMONWEALTH OF KENTUCKY, Pl'ff,
vs.
INTERNATIONAL HARVESTER COMPANY OF AMERICA, Def't.

The defendant, International Harvester Company of America, having prayed an appeal from the judgment of the Grayson Circuit Court, rendered herein against it at its April term, 1912, for a fine of fifteen hundred dollars and costs, now we covenant to and with the plaintiff that if said judgment be affirmed, we will pay said fine and costs, and all damages thereon, and the costs of the appeal.

Witness our hands this 30th day of April, 1912.

THE TITLE GUARANTY & SURETY COMPANY,
By J. C. GRAHAM, *Its Attorney in Fact.*

Taken and subscribed before me as Clerk of the Grayson Circuit Court, this April 30th, 1912.

MIKE PRYOR, *C. G. C. C.*

Bond filed, in office, April 30th, 1912.

Said power of attorney is in words and figures as follows, to-wit:—

Know all men by these presents: That The Title Guaranty & Surety Company, of Scranton, Pennsylvania, a corporation organized under the laws of the State of Pennsylvania has made, constituted and appointed, and by these presents does hereby make, constitute and appoint J. C. Graham its true, sufficient and
24 lawful attorney, with full power and authority to make, execute and deliver, for it, in its name and in its behalf, as surety, a bond or undertaking as follows:—

A bond in the Circuit Court of Grayson County, Kentucky, on behalf of the International Harvester Company of America, being a bond to supersede a judgment of fifteen hundred dollars, interest, costs, etc., rendered by said Court in re Commonwealth of Kentucky vs. International Harvester Company of America and being a bond on appeal to the Court of Appeals of Kentucky, hereby giving its said attorney full power and authority to do everything whatsoever requisite and necessary to be done for the purpose of making executing and delivering such obligation as fully as the officers of said The Title Guaranty & Surety Company, could do if personally present, and hereby ratifying and confirming all that its said attorney shall lawfully do or cause to be done by virtue hereof, but reserving to itself full power of substitution and revocation.

In witness whereof, The Title Guaranty & Surety Company has caused its corporate seal to be hereunto affixed, and these presents to be duly executed by Samuel K. Bland, General Agent, at Louisville, Kentucky, on this 22nd day of April, 1912.

THE TITLE GUARANTY & SURETY COMPANY,
By SAMUEL K. BLAND, [SEAL.]
General Agent at Louisville, Kentucky.

April 30th, 1912, filed.

Attest,
MIKE PRYOR, *C. G. C. C.*

The authority and powers of said Samuel K. Bland, as Agent is in words and figures as follows, to-wit:—

25 At a regular meeting of the Executive Committee of the Board of Directors of The Title Guaranty & Surety Company, of Scranton, Pennsylvania, held at the office of the Company in the City of Scranton, on the Fourth day of April, 1908, the following Resolution was adopted:

"Resolved, That Samuel K. Bland, General Agent of this Company at Louisville, in the State of Kentucky, be and he is authorized and empowered to make, execute and deliver in behalf of the Company, unto such person or persons, in the State of Kentucky, as he may select, its power of attorney constituting and appointing each such person its Attorney-in-Fact, with full power and authority to make, execute and deliver, for it, in its name and in its behalf, as

Surety, any particular bond or undertaking that may be required in the State of Kentucky, the nature of such bond or undertaking to be in each case specified in such power of attorney."

STATE OF PENNSYLVANIA,
County of Lackawanna, ss:

I, Fred'k K. Tracy, Assistant Secretary of The Title Guaranty & Surety Company, hereby certify that I have compared the foregoing copy of resolution with the original thereof, as recorded in the Minute Book of said Company, and that the same is a correct and true transcript therefrom, and of the whole of said original resolution.

Given under my hand and seal of the Company at the City of Scranton, Pennsylvania, this 27th day of April, 1908.

[SEAL.] FRED'K K. TRACY,
Assistant Secretary.

26 STATE OF KENTUCKY,
County of Jefferson, ss:

On this day personally appeared before me, a Notary Public in and for the State and County aforesaid, Samuel K. Bland, known to me to be the General Agent of The Title Guaranty & Surety Company at Louisville in the State of Kentucky, and as such he did thereupon acknowledge and deliver the foregoing instrument of writing as and for the act and deed of The Title Guaranty & Surety Company.

Witness my hand and seal, this 22nd day of April, 1912.

WM. W. GAUNT, [SEAL.]
N. P. J. C.

My Notarial Commission will expire Jan. 16th, 1916.

COMMONWEALTH OF KENTUCKY:

Grayson Circuit Court.

I, Mike Pryor, Clerk of the Grayson Circuit Court, do cetrify that the foregoing 22 pages is a true and correct copy of the record in this Court, in the case of the Commonwealth of Kentucky, vs. International Harvester Company of America. Said record contains the petition, and all the orders that were made and taken in the above styled case.

Witness my hand as Clerk of the Grayson Circuit Court, this May 2nd, 1912.

MIKE PRYOR.
Clerk Grayson Circuit Court.

27 With the foregoing transcript the appellant filed its statement of appeal in words and figures following, to-wit:—

Statement of Appeal.

Court of Appeals of Kentucky.

INTERNATIONAL HARVESTER COMPANY OF AMERICA, Appellant,
v.
COMMONWEALTH OF KENTUCKY, Appellee.

The judgment appealed from was rendered by the Grayson Circuit Court at the April Term, 1912, on April 12, 1912, and will be found on page 10 of the record.

No warning order is to be made or summons issued, as the appeal was granted by the court below.

The address of Appellee's counsel:
J. R. Layman, Elizabethtown, Ky.
C. V. Higdon, Leitchfield, Ky.
James Garnett, Attorney General, Frankfort, Ky.

ARTHUR M. RUTLEDGE,
HUMPHREY & HUMPHREY,
Attorneys for Appellant.

28 Afterwards at a Court of Appeals held in and for the Commonwealth of Kentucky at the Capitol in the City of Frankfort on the 22nd day of May, 1912, the following order was entered, to-wit:—

ITERNATIONAL HARVESTER CO. OF AMERICA,
vs.
COMMONWEALTH.

Grayson.

The court being sufficiently advised the motion of appellant to docket, advance and submit is sustained and this case is ordered to be docketed, advanced and submitted for decision.

Afterwards at a Court of Appeals held as aforesaid on the 28th day of May, 1912, the following judgment and orders were entered herein, to-wit:—

INTERNATIONAL HARVESTER COMPANY OF AMERICA, Appellant,
vs.
COMMONWEALTH OF KENTUCKY, Appellee.

Appeal from Grayson Circuit Court.

The court being sufficiently advised it seems to them there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed and that appellee recover of appellant 10% damages on the amount of the

judgment superseded herein. Which is ordered to be certified to said court.

It is further considered that appellee recover of appellant its cost herein expended.

29 At the same time, to-wit, May 28, 1912, the Court of Appeals of Kentucky delivered an opinion herein, which is in words and figures following, to-wit:—

30 Court of Appeals of Kentucky, May 28, 1912.

INTERNATIONAL HARVESTER COMPANY OF AMERICA, Appellant;
vs.
THE COMMONWEALTH OF KENTUCKY, Appellee.

Appeal from Grayson Circuit Court.

Opinion of the Court by Judge Carroll, Affirming.

In this penal action instituted by the Commonwealth against the appellant company, a trial before a jury was had and a verdict rendered in favor of the Commonwealth for $1,500.00.

It is agreed by counsel for appellant that this case is in all respects—except as to the amount of recovery—identical with the case of the Commonwealth vs. International Harvester Company of America, tried in the Bullitt Circuit Court. From the judgment of the Bullitt Circuit Court an appeal was prosecuted to this court by the appellant company, and the opinion affirming the judgment of the Bullitt Circuit Court may be found in 147 Ky., 564.

31 It is also agreed that the evidence heard in the Buillitt county case was read to the jury in this case, with the same effect as if the witnesses had testified in person.

Counsel for appellant frankly admit that the appeal in this case under that opinion is not prosecuted with the hope that a reversal might be had of this Court, but with a view of getting a decision in this Court so that the case may be taken on a writ of error in company with the Bullitt county case and other cases of like character to the Supreme Court of the United States.

We therefore adopt as the opinion of the Court in this case the opinion of the Court in the Bullitt county case handed down March 16, 1912, and reported as stated in 147 Ky., 564, with such changes in that opinion as to the name of the court and the amount of penalty as are necessary to conform to the facts of this case, to have the same force and effect as if it had been delivered in this case.

Wherefore the judgment appealed from is affirmed.

Arthur M. Rutledge, Humphrey & Humphrey, Louisville, Ky., for appellant.

James Garnett, Att'y Gen'l, Frankfort, Ky.; J. R. Layman, Elizabethtown, Ky.; C. V. Higdon, Leitchfield, Ky., for appellee.

[Endorsed:] May 28/12. International Harvester Co. of America vs. Com. of Ky.

32 Afterwards on the 19th day of June, 1912, the appellant and plaintiff in error filed in the office of the Clerk of the Court of Appeals of Kentucky its Assignment of Errors, which is in words and figures following, to-wit:—

Assignment of Errors.

Supreme Court of the United States.

INTERNATIONAL HARVESTER COMPANY OF AMERICA, Plaintiff in Error,
v.
COMMONWEALTH OF KENTUCKY, Defendant in Error.

The Plaintiff in Error, the International Harvester Company of America, assigns the following errors as having been committed herein:

1. The Court erred in failing to hold that the Act of the Legislature of Kentucky, approved March 21, 1906, operated so as to allow the persons therein described to enter into combinations which were forbidden to persons not therein described; and in failing to hold that there was thereby produced an unjust and unreasonable discrimination against the Plaintiff in Error and others similarly situated; and thereby the Plaintiff in Error was denied the equal protection of the laws as guaranteed under the Fourteenth Amendment to the Constitution of the United States.

2. The Court erred in holding that the Act of the Legislature of Kentucky of May 20, 1890; the Act of March 21, 1906, and the Constitution of the State of Kentucky, when read together had the effect of making it a penal offense against the laws of the State of Kentucky for the Plaintiff in Error to sell the product of its
33 manufacture at a price greater or less than its reasonable value, when there was no provision of the law fixing any standard of such reasonable value but the jury in each individual case was left to determine this question. Such a penal statute is so uncertain, indefinite and unreasonable as, if enforced, would, and as enforced by the judgment herein, did deprive the Plaintiff in Error of its property without due process of law, and deny to it the equal protection of the laws, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States.

3. The Court erred in failing to hold that the purpose and effect, and the manner of enforcement by the authorities of the State of Kentucky, of the said three provisions of the law of the State of Kentucky, mentioned in the second assignment of error, are discriminatory as against the Plaintiff in Error and others situated as is Plaintiff in Error, and in favor of those persons who are mentioned in the said Act of March 21, 1906, and the Plaintiff in Error has thereby been, and by the judgment herein rendered has been, denied the equal protection of the laws, and deprived of its property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States.

4. The Court erred in failing to hold that the Statutes of Kentucky under which this action is prosecuted, namely, the Acts of May 20, 1890 and March 21, 1906, as construed and applied by the Court of Appeals of Kentucky, are in conflict with the Constitution of the United States, and particularly with the fourteenth amendment thereof, for the following reasons among others, namely: that the said Statutes operate to deny to the defendant the equal protection of the law and to deprive this defendant of its property
34 without due process of law.

ALEXANDER P. HUMPHREY,
ALEXANDER P. HUMPHREY, JR.,
Attorneys for Plaintiff in Error.

On the same day, to-wit, June 19, 1912 there was filed in the office of the Clerk of the Court of Appeals the original Writ of Error, allowed by the Chief Justice of the Court of Appeals, which is hereto attached and — in words and figures as follows:—

35 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Judges of the Court of Appeals of Kentucky, Greeting:

Because in the record of proceedings, as also in the rendition of the judgment, of a plea which is in the said Court of Appeals of Kentucky, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between the International Harvester Company of America, Plaintiff in Error, and The Commonwealth of Kentucky, Defendant in Error, wherein was drawn in question the validity of a statute of, or an authority exercised under, said Commonwealth of Kentucky on the ground of their being repugnant to the Constitution of the United States, and the decision was in favor of such validity and manifest error hath happened, to the great damage of said International Harvester Company of America, Plaintiff in Error, as by its complaint appears, we, being willing that error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 17th day of July, 1912, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done
36 therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States, this the 18 day of June

1912, and of the Independence of the United States of America the 136th year.

[Seal United States of America, Eastern Dist. Court.]

JOHN W. MENZIES,
Clerk United States District Court,
Eastern Dist. of Ky., at Frankfort,
By CHAS. N. WIARD,
Deputy Clerk.

Allowed by

J. P. HOBSON,
Chief Justice of the Court of
Appeals of Kentucky.

Filed Jun- 19, 1912. Rob't L. Greene, C. C. A.

37 On the same day, to-wit, June 19, 1912, the appellant and plaintiff in error filed its Writ of Error Bond, which is in words and figures following, to-wit:—

Court of Appeals of Kentucky.

INTERNATIONAL HARVESTER COMPANY OF AMERICA, Plaintiff in Error,
v.
COMMONWEALTH OF KENTUCKY, Defendant in Error.

Know all men by these presents: That we, the International Harvester Company as Principal, and The Title Guaranty and Surety Company, as surety, are held and firmly bound unto the Commonwealth of Kentucky in the sum of three thousand — for payment of which well and truly to be made, we, the International Harvester Company of America, Principal, and The Title Guaranty and Surety Company, as surety, bind ourselves jointly and severally firmly by these presents.

Witness our hands and seals this 18th day of June, 1912.

The condition of this obligation is such that whereas the said Commonwealth of Kentucky instituted a certain action against the International Harvester Company of America, claiming a penalty of Five Thousand ($5,000) Dollars, and judgment was rendered accordingly in the Grayson Circuit Court in the sum of Fifteen hundred ($1500.00) dollars and subsequently an appeal was taken from said judgment to the Court of Appeals of Kentucky, which affirmed the same; and, whereas, the said International Harvester Company of America has sued out a writ of error from the Supreme Court of the United States to reverse said judgment of the Court of Appeals of Kentucky.

38 Now, therefore, if the above bounden International Harvester Company of America shall prosecute said writ of error to effect and answer the judgment, all damages and costs, if it fail

to make good this appeal, then this obligation shall be void, otherwise to remain in full force and effect.

INTERNATIONAL HARVESTER COMPANY OF AMERICA,
By ALEX P. HUMPHREY, JR.
THE TITLE GUARANTY AND SURETY COMPANY,
By ALEX P. HUMPHREY, JR.

The above and foregoing bond is approved this June 18 1912.

J. P. HOBSON,
Chief Justice of the Court of Appeals of Kentucky.

Filed Jun- 19 1912. Rob't L. Greene, C. C. A.

39 Know all men by these presents:

That The Title Guaranty & Surety Company, of Scranton, Pennsylvania, a corporation organized under the laws of the State of Pennsylvania, has made, constituted and appointed, and by these presents does hereby make, constitute and appoint

Either Alex. P. Humphrey or Alex. P. Humphrey, Jr., its true, sufficient and lawful attorney, with full power and authority to make, execute and deliver, for it, in its name and in its behalf, as surety, a bond or undertaking as follows:—

A bond in the Court of Appeals of Kentucky on behalf of the International Harvester Company of America, being a bond to supersede a judgment of the Court of Appeals of Kentucky rendered against the International Harvester Company of America in re International Harvester Company of America against the Commonwealth of Kentucky, being a bond on appeal from the said judgment to the Supreme Court of the United States, the original judgment in said action having been rendered by the Circuit Court of Grayson County, Kentucky, hereby giving its said attorney full power and authority to do everything whatsoever requisite and necessary to be done for the purpose of making, executing and delivering such obligations as fully as the officers of said The Title Guaranty & Surety Company, could do if personally present, and hereby ratifying and confirming all that its said attorney shall lawfully do or cause to be done by virtue hereof, but reserving to itself full power of substitution and revocation.

In witness whereof, The Title Guaranty & Surety Com-
40 pany has caused its corporate seal to be hereunto affixed, and these presents to be duly executed by Samuel K. Bland, General Agent, at Louisville, Kentucky, on this 13th day of May, 1912.

[SEAL.] THE TITLE GUARANTY & SURETY COMPANY,
By SAMUEL K. BLAND,
General Agent at Louisville, Kentucky.

At a regular meeting of the Executive Committee of the Board of Directors of The Title Guaranty & Surety Company, of Scranton,

Pennsylvania, held at the office of the Company in the City of Scranton, on the Fourth day of April, 1908, the following Resolution was adopted:

"Resolved, That Samuel K. Bland, General Agent of this Company at Louisville, in the State of Kentucky, be and he is authorized and empowered to make, execute and deliver in behalf of the Company, unto such person or persons, in the State of Kentucky, as he may select, its power of attorney constituting and appointing each such person its Attorney-in-Fact, with full power and authority to make, execute and deliver, for it, in its name and in its behalf, as Surety, any particular bond or undertaking that may be required in the State of Kentucky, the nature of such bond or undertaking to be in each case specified in such power of attorney."

STATE OF PENNSYLVANIA,
County of Lackawanna, ss:

I, Fred'k K. Tracy Assistant Secretary of The Title Guaranty & Surety Company, hereby certify that I have compared the
41 foregoing copy of resolution with the original thereof, as recorded in the Minute Book of said Company, and that the same is a correct and true transcript therefrom, and of the whole of said original resolution.

Given under my hand and the seal of the Company at the City of Scranton, Pennsylvania, this 27th day of April, 1908.

FRED'K K. TRACY,
Assistant Secretary.

STATE OF KENTUCKY,
County of Jefferson, ss:

On this day personally appeared before me, a Notary Public in and for the State and County aforesaid, Samuel K. Bland, known to me to be the General Agent of The Title Guaranty & Surety Company at Louisville in the State of Kentucky, and as such he did thereupon acknowledge and deliver the foregoing instrument of writing as and for the act and deed of The Title Guaranty & Surety Company.

Witness my hand and seal, this 13th day of May, 1912.

[SEAL.] WM. A. GAUNT,
N. P., J. C.

My Notarial Commission will expire Jan. 16th 1916.

On the same day, to-wit, June 19, 1912, there was filed in the Clerk's office of the Court of Appeals of Kentucky the original Citation herein, which is attached hereto and is in words and figures as follows:

42 UNITED STATES OF AMERICA, *ss:*

To Commonwealth of Kentucky, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington thirty (30) days after the date hereof, pursuant to a writ of error filed in the Clerk's Office of the Court of Appeals of Kentucky, wherein International Harvester Company of America is Plaintiff in Error, and you are Defendant in Error, to show cause, if any there be, why the judgment rendered against the plaintiff in Error, as in the said Writ of Error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable J. P. Hobson, Chief Justice of the Court of Appeals of Kentucky, this 12 day of June, 1912.

J. P. HOBSON,
Chief Justice of the Court of Appeals of Kentucky.

Citation accepted for the Commonwealth of Kentucky, Defendant in Error, this 18 day of June, 1912.

JAMES GARNETT,
Attorney General of Kentucky.

43 THE COMMONWEALTH OF KENTUCKY,
The Court of Appeals, set.:

In obedience to the commands of the Writ of Error, I herewith transmit to the Supreme Court of the United States, a complete transcript of the record *will* all things touching the same in the case of International Harvester Company of America vs. The Commonwealth of Kentucky on appeal from the Grayson Circuit Court, as the same appears from the records and files of my office.

In testimony whereof I have hereunto set my hand and affixed the seal of my office.

Done at the Capitol in the City of Frankfort on this the 1st day of July, A. D., 1912.

[Seal Kentucky Court of Appeals.]

ROBERT L. GREENE,
Clerk of the Court of Appeals of Kentucky.

Fee for this transcript $15.75.

Endorsed on Cover: File No. 23,278. Kentucky Court of Appeals. Term No. 703. International Harvester Company of America, plaintiff in error, vs. The Commonwealth of Kentucky. Filed July 8th, 1912. File No. 23,278.

10

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 292.

INTERNATIONAL HARVESTER COMPANY OF AMERICA, PLAINTIFF IN ERROR,

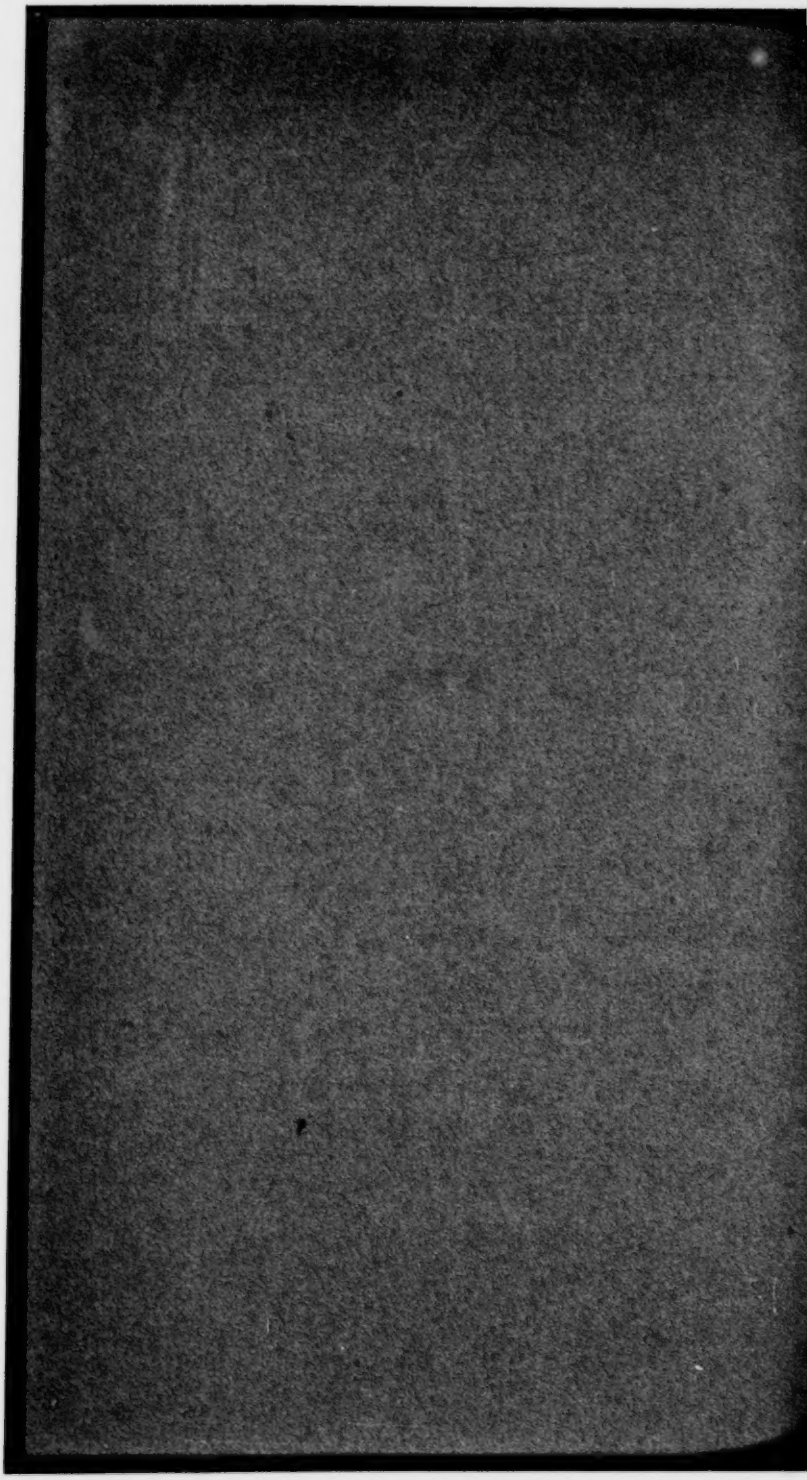
vs.

THE COMMONWEALTH OF KENTUCKY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

FILED JULY 8, 1913.

(23,279)



(23,279)

SUPREME COURT OF THE UNITED STATES.

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No. 292.

INTERNATIONAL HARVESTER COMPANY OF AMERICA, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF KENTUCKY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 22, 1914.

a THE COMMONWEALTH OF KENTUCKY:

The Court of Appeals.

INTERNATIONAL HARVESTER COMPANY OF AMERICA, Appellant,
vs.
THE COMMONWEALTH OF KENTUCKY, Appellee.

Appeal from Todd Circuit Court.

Pleas Before the Honorable Court of Appeals of Kentucky, at the Capitol, at Frankfort, on the 18th Day of April, 1912.

Be it remembered that heretofore, to-wit, on the 17th day of January, 1912, the appellant, International Harvester Company of America, by its counsel filed in the office of the Clerk of the Court of Appeals, a transcript of record and evidence in words and figures, following, to-wit:

1 COMMONWEALTH OF KENTUCKY:

Todd Circuit Court.

THE COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
THE INTERNATIONAL HARVESTER COMPANY OF AMERICA, Defendant.

Pleas Had Before Honorable W. P. Sandidge, Judge of the Todd Circuit Court, at Elkton, Todd County, Kentucky, on Thursday, December 14th, 1911.

2 Todd Circuit Court, March Term, 1911.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
INTERNATIONAL HARVESTER COMPANY OF AMERICA, Defendant.

Statement.

The plaintiff, Commonwealth of Kentucky, for cause, says the defendant is a corporation, duly chartered and incorporated under and by virtue of the laws of a state of the United States of America other than the State of Kentucky, and, as such, authorized to contract and be contracted with, and to sue and be sued in its corporate name, International Harvester Company of America; that heretofore in Todd County, Ky., the said defendant committed the offense of unlawfully and wilfully creating, establishing, organizing, entering into, becoming a member of and a party to and interested in

a pool, trust, combine, agreement, confederation and understanding with other corporations, partnerships, individuals, persons, and associations of persons for the purpose of regulating, controlling and fixing the price of merchandise, manufactured articles and property of other kinds, and in furtherance of which said purpose did regulate, control and fix the price and cost of said merchandise, manufactured articles and property of other kinds and did sell same at and above its real value.

The said offense was committed by the said International Harvester Company of America in Todd County, Ky., within one year before the institution of this action, and as follows, to-wit:

3 The said defendant in the county aforesaid, within the aforesaid time, did unlawfully and wilfully enter into a combination, confederation, pool, trust, combine, agreement, contract and understanding with the McCormack Harvester Company, The Deering Harvester Co., The Milwaukee Harvester Machine Co., D. M. Osborn Co., The Champion Machine Co., The Plano Machine Co., International Harvester Co., and other corporations, companies and partnerships, the names of which are to plaintiff unknown, some of which concerns, named and unnamed, are corporations, and some of which are stock companies, but the Commonwealth does not know and cannot state which are corporations and which are stock companies, and cannot give the names of the states under which the corporations are incorporated of those that are incorporated, and cannot give the names of the individuals constituting the companies and associations, nor the location of the main place of business of such of those that are not incorporated, for the purpose of regulating, controlling and fixing the price and market value of harvesting and farm machinery and implements, reapers, binders, mowers, rakes, manure spreaders, and the repairs for same, and other machinery and implements not named—all of which are manufactured and made by the aforesaid parties and to be produced, manufactured and made by them—whereby it was agreed and understood by and between the said International Harvester Company of America and said other partnerships and companies hereinbefore mentioned, and said other corporations and companies, the names and locations of which are to the Commonwealth unknown, as above alleged, that they would regulate, control and fix the price of the aforesaid machinery, implements, and repairs for same, to be produced, manufactured and sold by said companies and by the defendant.

4 The International Harvester Company of America, acting in conjunction with and for said other corporations, companies and partnerships, and for the purpose of fixing the price and selling said products and repairs in the markets at more than their real value, and that, pursuant to said agreement, confederation, pool, trust, combine, understanding and agreement, the said defendant and said other corporations, companies and partnerships and individuals unknown to the Commonwealth, did regulate, control and fix the price of said farm machinery and implements and the repairs for same at and above the real value thereof; and that the defendant, International Harvester Company of America, under and by virtue

of the terms of the agreement, pool, combine, etc. aforesaid, took over all the machinery manufactured and to be produced and manufactured by the other corporations, companies and partnerships aforesaid for the purpose of selling same — aforesaid, and did fix the price and sell the same as aforesaid —all of which was done as aforesaid against the peace and dignity of the Commonwealth of Kentucky.

Wherefore, Plaintiff, Commonwealth of Kentucky, prays judgment against the defendant, International Harvester Co., of America, for the sum of Five Thousand Dollars ($5,000.00); for her costs about this action expended, and for all proper relief to which she may be entitled in the premises.

W. G. DAVIS,
County Att'y, Todd Co., Ky.
JAS. R. MALLORY,
Commonwealth's Att'y, 7th Circuit
Court District of Ky.,
Attorneys for Plaintiff.

Filed and summons issued to Jefferson Co. March 2nd, 1911.
JNO. A. GOODMAN, *Clk.*

5 COMMONWEALTH OF KENTUCKY

Todd Circuit Court, July Term, July 14th, 1911

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
INTERNATIONAL HARVESTER COMPANY OF AMERICA, Defendant.

Order.

This day came the defendant by its attorneys and tendered in open court and asked to have filed its demurrer and answer herein.

It is thereupon ordered by the court that said demurrer and answer be and the same are hereby filed, said answer being without prejudice to the demurrer and without waiving the same.

6 Todd Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
THE INTERNATIONAL HARVESTER COMPANY OF AMERICA, Defendant.

Demurrer.

The defendant, International Harvester Company of America demurs to the petition or statement herein and for grounds it says that the same does not set out facts sufficient to constitute the commission of any public offense or any valid cause of action against it.

Notwaivingother grounds of demurrer, but insisting thereon, the de-

fendant, International Harvester Company of America hereby assigns as one ground for its demurrer herein that the Act of May 20, 1890, being chapter 101 Ky. Statutes, under which this action was instituted and by virtue of which said action is sought to be maintained, must be taken, considered and read in connection with the Act approved March 21, 1906, entitled: "An Act permitting persons to combine or pool their crops of wheat, tobacco and other products and sell same as a whole, and making contracts in pursuance thereof valid," and, when read, taken or construed in connection with said Act of March 21, 1906, said Act of May 20, 1890, denies to it, and other persons within the jurisdiction of the State of Kentucky, the equal protection of the law, and is in violation of the Fourteenth Amendment of the Constitution of the United States and is void.

7 The defendant assigns for further ground of said demurrer herein that the said Act of May 20, 1890, as construed by the Court of Appeals of Kentucky, fails to provide or establish any fixed standard or criterion by which to determine what was or is the real value of the articles and machinery herein alleged to have been sold by the defendant and is therefore in violation of the Fourteenth Amendment of the Constitution of the United States in that it permits this defendant and persons and corporations within the State to be deprived of their property without due process of law and is therefore null and void.

And on this the defendant prays the judgment of the court.

ARTHUR M. RUTLEDGE,
BROWDER & BROWDER,
Attorneys for Defendant.

Filed July 14, 1911.

JNO. A. GOODMAN, *Clk.*

8 COMMONWEALTH OF KENTUCKY:

Todd Circuit Court, July Term, July 14th, 1911.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
INTERNATIONAL HARVESTER COMPANY OF AMERICA, Defendant.

Order.

Came defendant by its attorney and filed a demurrer to the petition or statement of the plaintiff herein, and the Court having considered same adjudges that said demurrer be, and the same is now, overruled, to which ruling of the court defendant excepts.

9 COMMONWEALTH OF KENTUCKY:

Todd Circuit Court, July Term, July 14th, 1911.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
INTERNATIONAL HARVESTER COMPANY OF AMERICA, Defendant.

Order.

Came defendant by its attorney and with leave of court filed its plea of not guilty and of former acquittal and its answer herein.

10 Todd Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
INTERNATIONAL HARVESTER COMPANY OF AMERICA, Defendant.

Plea of Not Guilty and of Former Acquittal and Answer.

The defendant, International Harvester Company of America, for plea of not guilty and of former acquittal and by way of answer herein, pleads as follows:

Paragraph No. 1.

The defendant denies that it committed the offense of unlawfully or willfully creating, establishing, organizing, entering into, becoming a member of, or a party to, or interested in a pool, trust, combine, agreement, confederation, or understanding with any other corporations or companies, partnerships, individuals, persons or associations of persons, for the purpose of regulating, controlling or fixing the price of any merchandise, or any manufactured article or articles, or any property of any kind at any time before the commencement of this action; and denies that in furtherance of any such understanding, or agreement, or purpose, or at all, it did regulate, or control, or fix the price, or cost of said merchandise, manufactured articles, or property of other kinds; denies that it did sell the same at or above its real value. It denies that any such offense was committed by the defendant in the County of Todd in the State of Kentucky, within one year before the institution of this action in form or manner as set out in the statement of the petition or otherwise.

11 The defendant denies that in the county aforesaid, within the aforesaid time, or within any other time, it did unlawfully or wilfully enter into any combination, or confederation, pool, trust, combine, agreement, contract, or understanding, with the McCormick Harvester Co. or the Deering Harvester Co., or the Milwaukee Harvester Machine Co., or the D. M. Osburn Co., or the Champion Machine Co., or the Plano Machine Co., or the International Harvester Co., or any other corporation or corporations,

company or companies, partnership or partnerships, the names of which are to the plaintiff unknown, or that any of the concerns named or unnamed, whether corporations or joint stock companies, for the purpose of regulating, controlling, or fixing, the price and market value of the harvesting and farm machinery, of implements, reapers, binders, mowers, rakes, manure spreaders, or any of the repairs for same, or any other machinery, or implement or implements, any of which were, or are manufactured, or made by the aforesaid parties, or are to be produced, or manufactured, or made by them, whereby it was agreed or understood by or between the defendant and any other partnership, or company named in the statement of any other corporation or company, the names or location of which — unknown to the Commonwealth; that they would regulate, control, or fix the price of any of the said machinery, or implements, or repairs for same, to be produced, manufactured, or sold by any of said companies, or corporations, or companies, or partnerships, or for the purpose of fixing the price of selling said products or repairs in the markets at more than their real value, and it denies that pursuant to any such agreement, or confederation, or pool, or trust, or combine, or understanding, or agreement, none of which existed in point of fact, the defendant, or any of said corporations, or companies, or partnerships, or individuals, unknown to the
12 plaintiff, did regulate, or control, or fix the price of any of said farm machinery, or implements, or repairs for same, at (the) above or real value thereof; or that the defendant, under or by virtue of the terms of any such alleged agreement, or pool, or trust, or combine or etc. aforesaid, took over any or all of the machinery manufactured or to be produced or manufactured by any of said other companies, or corporations, or partnerships, for the purpose of selling the same, or that it did fix the price or sell the same as alleged in the statement, or that any of said alleged acts were done against the peace and dignity of the Commonwealth of Kentucky.

It denies that the plaintiff is entitled to judgment against it in the sum of Five Thousand Dollars ($5,000.00) or any other sum, or for its costs or any relief.

Paragraph No. 2.

The defendant pleads that it is not guilty of the offense charged in the statement or petition filed herein.

Paragraph No. 3.

The defendant pleads that it has been acquitted of the offense charged in the statement or petition filed herein by the judgment of the Simpson Circuit Court in the Commonwealth of Kentucky rendered on the 5th day of November 1909. It says that on the 10th day of March, 1909, the grand jury of the County of Simpson in the State of Kentucky duly returned into said court, an indictment against this defendant, which is in the following words:

18 "Simpson Circuit Court, March Term, 1909.

THE COMMONWEALTH OF KENTUCKY
against
INTERNATIONAL HARVESTER COMPANY OF AMERICA.

Indictment.

The Grand Jurors of the County of Simpson in the name and by the authority of the Commonwealth of Kentucky, accuse the International Harvester Company of America, a corporation, of the offense of unlawfully and willfully creating, establishing, organizing, entering into and becoming a member and party to and interested in a pool, trust, combine and agreement and understanding with a number of machine companies which were independent companies from it for the purpose of controlling and fixing the prices of certain articles of farming machinery and repairs above their real value same done in restraint of trade, committed as follows, to-wit: On the — day of —— A D., 1908, in the county aforesaid, being a corporation created with the right to sue and be sued, under and by virtue of the laws of the States of the United States of America other than Kentucky, *the* "the" grand jury unknown, organized for the purpose and engaged in doing business in Kentucky and in Simpson County, did unlawfully and willfully create, establish, organize, enter into and become a member of or a party to and interested in a pool, trust, combine, agreement, confederation and understanding with the McCormick Machine Company, Champion Machine Company, the Plano Machine Company, Deering Harvester Company, some of which are corporations and some of which are joint stock companies; but the grand jury cannot say which are corporations and which are not, nor can they say who constitutes the members of any stock company named or in what state those being incorporated are incorporated, and various other companies and corporations to this grand jury unknown, for mowers, reapers, binders, rakes and repairs for same sold in Simpson County, so as to enhance the prices on said mowers, reapers and binders and rakes and repairs for same above their real value. Said pool, combine or agreement now exists and has existed for some time and by reason of same said International Harvester Company has sold to the Franklin Hardware Company and to Hatter and McGar and to other persons and firms and corporations in Simpson County to the Grand Jury unknown, mowers reapers, binders and rakes and repairs for same, at a greater price than their real value, same done in restraint of trade and done as aforesaid and against the peace and dignity of the Commonwealth of Kentucky.

T. J. SPARKS,
Commonwealth's Attorney, Seventh Circuit Court, District of Kentucky.

14 The same was endorsed on the back as follows:

No. 222. Commonwealth of Kentucky vs. The International Harvester Company of America. Indictment of Combination in Restraint of Trade. A true bill. J. T. Lovell, Foreman of Grand Jury. Presented by the Foreman, in the presence of the Grand Jury, to the Court and filed in open court, this 10th day of March, 1909. G. R. Taylor, C. S. C. C. by G. F. Saunders, D. C. Witnesses: John Crowdus, T. J. Edwards, James T. Lovell, Joe Lucas, D. H. Hetter, J. H. McGar, Alf. Harris, Mallory Gill, Elkton, Ky. Claude Grainger."

The said indictment against the defendant was duly filed in said court and this defendant thereafter duly pleaded not guilty thereto and on the issue thus raised a trial was had in said Simpson Circuit Court before a jury duly empanelled, which, after hearing the evidence, returned a verdict finding the defendant to be not guilty of the charge therein contained and upon which verdict a judgment was duly recorded by said court at the same term thereof, adjudging the defendant to be not guilty of the offense in said indictment charged against it and adjudged that said indictment be and the same was thereupon dismissed, which said judgment is still in full force and unreversed.

15 This defendant says that the pool, trust, combine, agreement, confederation and understanding which the defendant in this present action is charged with creating, establishing, organizing, entering into and becoming a member of, is the same pool, trust, combine, agreement, confederation and understanding charged against the defendant in the indictment in the Simpson Circuit Court hereinbefore copied, that it has not since the finding of said indictment, entered into any pool, trust, combine, agreement, confederation or understanding such as is charged against it in this agreement, or confederation, or understanding if any had ever been entered into by it with the other corporations or any of them in the indictment mentioned existed and was made before the finding of said indictment in the Simpson Circuit Court, to-wit: before March 10, 1909.

Defendant pleads and relies upon said facts in bar of the further prosecuting of this action against it.

ARTHUR M. RUTLEDGE,
BROWDER & BROWDER,
Attorneys for Defendant.

Filed of record July 14th, 1911.

JNO A. GOODMAN, *C'k.*

16 COMMONWEALTH OF KENTUCKY:

Todd Circuit Court, July Term, July 14th, 1911.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
INTERNATIONAL HARVESTER COMPANY OF AMERICA, Defendant.

Order.

Came plaintiff by attorney and filed a general demurrer to the defendant's plea of not guilty and of former acquittal and to the answer of the defendant herein, and to each and every paragraph thereof, and this cause is now submitted on said demurrer.

17 Todd Circuit Court, July Term, 1911.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
INTERNATIONAL HARVESTER COMPANY OF AMERICA, Defendant.

Demurrer.

The plaintiff, Commonwealth of Kentucky, demurs generally to the plea of not guilty and of former acquittal and answer of the defendant in the above styled cause, and to each and every paragraph thereof, for the reason that same does not constitute a good defense or any defense to the cause of action set up in plaintiff's petition.

Wherefore, plaintiff prays judgment that its said demurrer be sustained, and for all proper and general relief in the premises.

JAS. R. MALLORY,
Attorney for Plaintiff.

Filed of Record, July 15th, 1911.

JNO. A. GOODMAN,
Clk Todd Circuit Court.

18 COMMONWEALTH OF KENTUCKY:

Todd Circuit Court, July Term, July 14th, 1911.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
INTERNATIONAL HARVESTER COMPANY OF AMERICA, Defendant.

Order.

Came plaintiff and filed a special demurrer to the third paragraph of defendant's plea of not guilty and of former acquittal and to defendant's answer, and this cause is now submitted on said demurrer.

19 Todd Circuit Court, July Term, 1911.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
INTERNATIONAL HARVESTER COMPANY OF AMERICA, Defendant.

Demurrer.

Comes now the plaintiff in the above styled matter and demurs to the third paragraph of defendant's plea of not guilty and of former acquittal and answer, for the reason that same constitutes no defense and no part of a defense to plaintiff's cause of action set up in its statement herein.

Wherefore, plaintiff prays that its demurrer be sustained to the said third paragraph of defendants answer, etc. and for all proper relief to which it is entitled in the premises.

JAS. R. MALLORY, *Attorney.*

Filed of Record, July 15th, 1911.

JNO. A. GOODMAN,
Clk Todd Circuit Court.

20 COMMONWEALTH OF KENTUCKY:

Todd Circuit Court, July Term, July 14th, 1911.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
INTERNATIONAL HARVESTER COMPANY OF AMERICA, Defendant.

Order.

This cause having been submitted to the Court for trial on the general demurrer of plaintiff to defendant's answer herein and demurrer to each paragraph thereof and special demurrer to the third paragraph thereof, and the court being sufficiently advised, adjudges that said demurrers be, and the same are, hereby sustained as to the third paragraph of defendant's plea of not guilty and of former acquittal and answer and be overruled as to other paragraphs thereof, to which ruling of the court the defendant, International Harvester Company of America, objects and excepts.

21 COMMONWEALTH OF KENTUCKY:

Todd Circuit Court, July Term, July 17th, 1911.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
INTERNATIONAL HARVESTER COMPANY OF AMERICA, Defendant.

Order.

It is ordered that all material affirmative allegations contained in the answer of defendant herein be, and the same are, now de-

nied and controverted by the plaintiff on the record, and it is ordered that this cause be and it is set for trial on the first day of the next term of this court.

22 COMMONWEALTH OF KENTUCKY:

Todd Circuit Court, December Term, Dec. 4th, 1911.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
INTERNATIONAL HARVESTER COMPANY OF AMERICA, Defendant.

Order.

On Penal Action.

On motion it is ordered that S. F. Davis, Official Stenographer of this Court, be, and he is hereby, directed to take a complete stenographic report of the proceedings had and evidence heard upon the trial of this action.

The parties appeared by attorneys and defendant having heretofore entered a plea of not guilty, thereupon came the following jurors, to-wit: Sam Criswell, M. A. Troutt, R. M. Thompson, T. V. Camp, Marion Wright, J. L. Gorrell, M. M. Braden, A. R. Anderson, Ben Lacy, H. F. Dill, T. M. Dycus and Ira Mobley, who were duly empanelled and sworn, and after having heard so much of the evidence as was offered by plaintiff and defendant and there not being time to conclude the trial this day, the jury after being admonished by the court were permitted to disperse to meet again tomorrow morning at nine o'clock.

23 COMMONWEALTH OF KENTUCKY:

Todd Circuit Court, December Term, December 5th, 1911.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
INTERNATIONAL HARVESTER COMPANY OF AMERICA, Defendant.

Order and Judgment.

The jury herein came into court and after having received the instructions of the court and heard the argument of counsel, retired and after consultation returned into open court the following verdict:

"We, the jury, find defendant guilty and fix its punishment at a fine of Twenty-five Hundred ($2,500.00) Dollars.

M. A. TROUT, *Foreman.*"

Wherefore it is adiudged by the court that the plaintiff, Commonwealth of Kentucky, recover of the defendant, the International Harvester Company of America, the sum of Twenty-five Hundred ($2,500.00) Dollars, and its costs herein.

24 COMMONWEALTH OF KENTUCKY:

Todd Circuit Court, December Term, Dec. 6th, 1911.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
INTERNATIONAL HARVESTER COMPANY OF AMERICA, Defendant.

Order.

This day came the defendant by attorneys and tendered in open court and asked leave to have filed its motion in arrest of judgment herein, and without waiving same, to file its motion and grounds for a new trial of this cause, and it is thereupon ordered by the court that said motion and grounds be and they are hereby filed of record and ordered to lie over for hearing, and this cause is now submitted on said motion.

24½ Todd Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
INTERNATIONAL HARVESTER COMPANY OF AMERICA, Defendant.

Motion in Arrest of Judgment.

Now comes the defendant, International Harvester Company of America and moves the court in arrest of the judgment herein, and as grounds for said motion it respectfully sets out that the petition or statement herein does not contain facts sufficient to constitute a valid, or any, cause of action against it, or the commission of any public offense. And upon the motion it prays the judgment of the court.

INTERNATIONAL HARVESTER COMPANY OF AMERICA.
By ARTHUR M. RUTLEDGE,
S. W. FORGY AND
BROWDER & BROWDER,
Attorneys.

Filed of record December 6th, 1911.
JNO. A. GOODMAN, *Clk.*

25 Todd Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
INTERNATIONAL HARVESTER CO. OF AMERICA, Defendant.

Motion and Grounds for New Trial.

Now comes the defendant, International Harvester Company of America, and moves the court to set aside the verdict of the jury

and vacate the judgment rendered thereon in this cause at the present term of this court and grant to it a new trial herein, and for grounds of said motion sets out as follows:

First. That the court erred to the prejudice of the defendant's substantial rights in overruling its general demurrer to the petition or statement herein, to which decision of the court in overruling said demurrer the defendant at the time excepted and still excepts.

Second. That the court erred to the prejudice of the defendant's substantial rights in overruling its motion made at the conclusion of the evidence introduced by the Commonwealth that the jury be directed to find a verdict for it, to which decision of the court in overruling said motion for said peremptory instruction to find for the defendant it excepted and still excepts.

Third. That the court erred to the preindice of the defendant's substantial rights in overruling its motion made at the conclusion of all the evidence that the jury be directed to find a verdict for it, to which decision of the court in overruling said motion for said
26 peremptory instruction to find for it the defendant at the the time excepted and still excepts.

Fourth. That the verdict of the jury and the fine assessed are excessive and appear to have been given under the influence of passion and prejudice.

Fifth. That the verdict of the jury is not sustained by sufficient, or any, evidence, and is contrary to law.

Sixth. That the court erred to the preindice of the defendant's substantial rights in giving to the jury instructions Numbers 1, 2 and 3, to the giving of each and all of which said instructions to the jury the defendant at the time excepted and still excepts. Said instructions are attached hereto and made a part hereof as if copied herein, marked respectively Nos. 1, 2 and 3.

Seventh. That the court erred to the preindice of the defendant's substantial rights in refusing to give to the jury instruction A, instruction B and instruction C, which said three instructions were offered by the defendant, and a motion was made by the defendant that said instructions and each of them be given to the jury, but the court declined to give said instructions, or any one of them and overruled said motion, to which decision of the court in overruling said motion and declining to give said instructions, or any one of them, the defendant at the time excepted and still excepts. Said three offered instructions, marked A, B and C respectively, are filed herewith and made a part hereof, being marked "Refused."

Eighth. That the court erred to the preindice of the defendant's substantial rights in permitting the plaintiff, Commonwealth
27 of Kentucky, to introduce before the jury certain evidence over the objection of defendant made at the time; and likewise erred to the preindice of defendant's rights in refusing to permit it to introduce certain evidence offered by it upon the trial of said cause, to which ruling and decision of the court defendant at the time objected and excepted and still excepts; all of which said rulings, testimony, avowals, objections and exceptions fully appear in the stenographer's report of the evidence heard on the trial of this

cause as made by the official stenographer of this court, to which reference is here made.

And upon this motion the defendant prays the judgment of the court.

INTERNATIONAL HARVESTER COMPANY OF AMERICA,
By ARTHUR M. RUTLEDGE,
S. W. FORGY AND
BROWDER & BROWDER,
Attorneys.

28 "1."

The Court instructs the jury that if they believe from the evidence beyond a reasonable doubt that the defendant, International Harvester Company of America, before the 2nd day of March, 1911, created, established, organized, entered into, or became a member of, or in any way interested in, a pool, trust, combine, agreement, confederation or understanding with the McCormick Harvester Company, the Deering Harvester Company, the Milwaukee Machine Harvester Company, D. M. Osburn Company, the Champion Machine Company, the Plano Machine Company, the International Harvester Company, or any of said companies, or with other companies or corporations or individuals, for the purpose of regulating or controlling or fixing the price of harvesting or farm machinery, or implements, reapers, binders, mowers, rakes, manure spreaders, or any of these things, or the repairs for same, or any of same, manufactured by them, and that the purpose or effect of said pool, trust, combine, agreement, confederation or understanding, if any, was to enhance the price of said harvesting or farm machinery, reapers, binders, mowers, rakes, manure spreaders, or repairs for the same, above their real value; and if the jury further believe from the evidence that the defendant company, in pursuance of, or while a member of, a party to, or in any way interested in any such pool, trust, combine, agreement, confederation or understanding, in Todd County and in less than one year before the 2nd day of March, 1911,

29 sold any harvesting or farming machinery, reapers, mowers, rakes, binders, or repairs for same, at more than their real value,—then and in that event the jury should find the defendant guilty and fix its punishment at a fine of not less than five nor more than five thousand dollars, in the discretion of the jury.

Given.

"2."

If the jury have a reasonable doubt of the defendant being proved guilty, they will find it not guilty.

Given.

"3."

Although the jury may believe from the evidence that the defendant company did form a combine or pool with other corporations or companies or individuals for the purpose of controlling or regulat-

ing the price of farming machinery; and although the jury shall further believe from the evidence that after the formation of said pool or combination, if any was formed, the price of farming implements sold by defendant was increased; yet if the jury further believe from the evidence that the increased price, if any, was due solely to an increase in the price of the raw material that went into said machinery, or to an increase in the price of labor employed in the manufacture of said machines, or to both of these things, then and in that event the jury will find the defendant not guilty.

Given.

30 "A."

In determining the real value of the machines sold by the defendant, the jury should consider the improved condition of the machines, if they believe from the evidence such improvements enhanced its real value

Refused.

"B."

The defendant company had the right to form a combination or pool with other corporations, or companies or individuals for the purpose of fixing, controlling or regulating the price of said articles of property, provided that at the time of the formation of said pool, or combination, if any, it did not do so for the purpose of enhancing the value of said merchandise or articles of property above their real value.

Refused.

"C."

Although the jury may believe as set out in No. 1, yet if they jury shall believe from the evidence that during all the time inquired into, to-wit, twelve months before the finding of the indictment, there were other companies, corporations, associations or persons selling generally throughout Todd County, farm machinery, rakes, mowers, binders, reapers and repairs of same, being the same commodities as those refered to in the indictment, which said other companies, corporations, associations or persons were engaged
31 in said business independently of the defendant company or any of the companies charged to have entered into said combination referred to, and in actual and active competition with the defendant and said companies charged to have entered into said combination, if any, then the jury will find the defendant not guilty.

Refused.

Filed of Record December 6th, 1911.

JNO. A. GOODMAN, *Clerk*.

32 COMMONWEALTH OF KENTUCKY:

Todd Circuit Court, December Term, December 14th, 1911.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
INTERNATIONAL HARVESTER COMPANY OF AMERICA, Defendant.

Order.

Defendant's motion in arrest of judgment coming on to be heard and the court being advised, it is adjudged by the court that said motion be, and the same is, hereby overruled, to which decision and judgment of the court in overruling said motion defendant excepts.

33 COMMONWEALTH OF KENTUCKY:

Todd Circuit Court, December Term, December 14, 1911.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
INTERNATIONAL HARVESTER COMPANY OF AMERICA, Defendant.

Order.

Defendant's motion and grounds for a new trial coming on to be heard and the court being advised, is of the opinion that said grounds are insufficient, and it is therefore adjudged by the court that said motion be, and the same is, hereby overruled, to which judgment of the court in overruling said motion the defendant excepts and prays an appeal to the Court of Appeals, which is granted. Provided, the defendant shall cause to be lodged and filed in the office of the Clerk of the Court of Appeals a transcript of the record in this cause within sixty days from the date of the judgment.

34 COMMONWEALTH OF KENTUCKY:

Todd Circuit Court, December Term, Dec. 14th, 1911.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
INTERNATIONAL HARVESTER COMPANY OF AMERICA, Defendant.

This day came the defendant by attorneys and tendered in open court and asked leave to have filed and made a part of the record herein its bill of exceptions in this cause, together with the official stenographer's transcript of evidence heard upon the trial of said cause, together with a carbon copy of said transcript of evidence, and it is now ordered by the court that said bill of exceptions and said transcript of evidence and the carbon copy thereof be, and each of them, is hereby filed of record and ordered to lay over for examination and approval.

35 COMMONWEALTH OF KENTUCKY:

Todd Circuit Court, December Term, Dec. 14, 1911.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
INTERNATIONAL HARVESTER COMPANY OF AMERICA, Defendant.

Order.

The Court having duly examined the bill of exceptions heretofore filed in this cause by the defendant and also having duly examined the official stenographer's transcript of evidence heretofore filed in this cause, and being sufficiently advised, it is now ordered by the court that said bill of exceptions be, and the same is, hereby approved and ordered certified by the presiding Judge of this Court, and it is further ordered by the Court that the transcript of evidence and a carbon copy thereof heretofore filed, duly signed by the official stenographer of this Court, be, and the same is, hereby approved by this court and ordered certified to by the Judge of this Court.

36 Todd Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
THE INTERNATIONAL HARVESTER COMPANY OF AMERICA, Defendant.

Bill of Exceptions.

Be it remembered that beginning on the 4th day of December, at the regular December Term, 1911, of the Todd Circuit Court, this cause was tried in open court before and by a jury; and thereupon the Commonwealth introduced as evidence on its behalf the deposition of M. W. GILL, which said deposition is in words and figures as follows, to-wit:

Examined by J. R. MALLORY, attorney for Commonwealth:

Q. Your name M. W. Gill?
A. Yes sir.
Q. Where do you live?
A. Elkton, Ky.
Q. In what business are you engaged?
A. Traveling salesman for Brindley Hardware Co., of Louisville.
Q. Prior to your employment by Brinly Hardware Company, who did you represent, if any one?
A. International Harvester Company.
Q. In what capacity?
A. Part of the time I was blockman and part of the time canvasser.
Q. Did you represent any machine company prior to the time you represented the International Harvester Company?

37 A. Deering Machine Company.

Q. When did you represent the Deering Machine Company?

A. From 1898 until the formation of the International Harvester Co.

Q. About how many years?

A. My best recollection it was four years. I think the International Harvester Company was formed in 1902 or 1903, but my recollection is not clear just which year.

Q. In what capacity did you represent the Deering Harvester Company?

A. First salesman and then blockman or canvasser and blockman, the way it is termed.

Q. Define what you mean by salesman, canvasser and blockman?

A. Canvasser is a salesman sent out to assist the local agent in making sales, calling on the farmers, receiving their orders for the goods, such as mowers and binders, anything they sell, and the blockman, he makes the contracts with the agents that represent the branch companies in these different counties.

Q. And I believe you said you represented the Deering Harvester Company in both of those capacities prior to the time you represented the International Harvester Company?

A. Yes sir.

Q. Along about the years 1898, 1899 and 1900, and about the time of the formation of the International Harvester Company, state what companies, if any, were in competition with you during those years?

A. The McCormack, Plano, the Champion, The Osborn and the Walter A. Wood, I believe that embraces all that I was in

38 competition with at that time.

Q. Did those companies or not during those years have salesmen, agents, canvassers and blockers?

A. Yes sir.

Q. State whether or not they operated in the same territory in which you worked during those years?

A. Yes sir.

Q. Do you remember what year it was the International Harvester Company was organized?

A. Yes sir, not clearly, but it was in the fall of 1902, I think.

Q. What information did you have about the formation of the International Harvester Company of America?

A. None except the changing of my instructions first from the Deering Machine Company and then I got instructions from——

Objected to—overruled, to which defendent excepted.

—Well, I was working in the machine business, and I was notified that the companies had all been merged into what is known as the International Harvester Company of America, and that the business would be known as the Deering division, the Milwaukee division and so on as to the different branches.

Q. Did you or not continue to represent your company after that?

A. I represented then what is known as the Deering division of the International Harvester Company.

Q. How long did you represent that concern?

A. I think it was about 18 months or two years, something like it.

Q. In what capacity?

A. At that time I was assistant blockman and canvasser.

Q. In what territory?

39 A. Portion of the time in Todd and Logan and Simpson and Daviess, and those counties along in this part of the State.

Q. Did you during that time represent them in any other country other than this?

A. Yes, sir, I was sent to England for a year—Europe, either in 1903 or 1904, I don't remember which now.

Q. Who did you represent on that trip?

A. The Deering Division of the International Harvester Co.

Q. During the time you represented this concern where were your headquarters?

A. Louisville, except when I was in Europe, and it was then in London.

Q. Were your duties, during the time you represented the Deering division of the International Harvester — of America, or not, the same towards that concern as they were towards the Deering Harvester Company prior to that arrangement with the International Harvester Company?

A. I didn't understand the first part of your question.

Q. The question is whether or not your duties were the same during the time you represented the Deering Harvester Company as they were when you represented the Deering division of the International Harvester Company?

A. Yes sir, they were similar. I called on the farmers and made sales to the farmers, and also contracted with the dealers. I did some of that work with the Deering Machine Company too.

Q. What change, if any, was later made between the International Harvester Company and the Deering Harvester Company?

A. At what period do you mean?

40 Q. After your trip to Europe?

A. After my trip to Europe I came back and worked about six months here, or three or four months.

Q. Who did you represent during that time?

A. International Harvester Company.

Q. The International Harvester Company of America?

A. Yes sir.

Q. Where were your headquarters?

A. Louisville.

Q. Now during the time you represented the Deering division of the International Harvester Company were there or not other divisions of that concern; and if so, what divisions?

A. McCormick division, Milwaukee division, Plano division and Champion division.

Q. Each of those companies, with which you had competition during the time you represented the Deering Harvester Company of the

International Harvester Company of America—I mean, each of those companies, with which you had competition during the time you represented the Deering Harvester Company, then had a division of the International Harvester Company during the time that you represented the Deering division of the International Harvester Company, did they?

A. Did I understand you to ask during the time I represented the Deering Harvester Company, the companies that were in competition with the Deering Harvester Company at that time were at the time I represented the Deering Division of the International HarvesterCompany, a division of the International Harvester Company?

Q. The question is if during the time you represented the Deering division of the International Harvester Company of
41 America, these other companies had a division of it?

A. Yes sir.

Q. State whether or not during those times these separate divisions had representatives, salesmen, canvassers and blockmen, as they had prior to the organization of the International Harvester Co.?

A. Yes sir.

Q. In what capacity did you say you represented the International Harvester Company of America, after your return from Europe?

A. As assistant blockman or rather as extra blockman. I had no special territory. I was sent anywhere.

Q. Now, during that time what machines did you handle?

A. During that time, it was settlement time, when I made settlements it was in the fall of the year, and I made settlements for the Deering, McCormick, Plano, Champion and Milwaukee.

Q. You did this as representative of what concern?

A. International Harvester Company of America.

Q. You made settlements for all these different companies, your old company and these other companies that you had previously been in competition with when you represented the Deering Harvester Company, and the Deering division of the International Harvester Company?

A. Yes sir.

Q. Do you remember what year this was?

A. Either the fall of 1903 or 1904, I don't remember distinctly which year it was.

Q. During the time you represented the International Harvester Company of America, did the Deering Harvester Company or the Milwaukee Harvester Machine Company or any of these com-
42 panies have a representative in the territory in which you represented the International Harvester Company, or were you representing all of them?

A. If I was sent to Elkton here, say for instance, to represent some business with the Deering agent, I represented that division, and there might have been some other man here at the same time working with another agent in some other line of the business, but possibly in another district I was sent to represent some other line to what I was here.

Q. Suppose on that trip here to Elkton there was an agent for the Milwaukee, did you settle with him?

A. Yes sir.

Q. You settled with him?

A. Yes sir. I will not make the statement that I settled with the agent here. I just used that to illustrate.

Q. If there had been one here at that time?

A. When we went to a town we settled the whole business before we left. If there were five agents in the town we settled with all of them before we left, if it was ready for settlement. All of the contract papers were filed with us, settled papers.

Q. At the time you represented the International Harvester Company in this capacity of assistant blockman, do you know the price at which they had sold their machines, take for instance a binder of a certain size, Deering for instance?

A. Do I remember the amount those machines were charged up to the dealer at?

Q. Yes sir.

A. My memory is not clear exactly on that, different size machines.

43 Q. Do you remember whether or not at that time, in settlement for the different companies, the agents were charged the same price for the different machines, different makes of binders of the same size?

A. Yes sir.

Q. What about the mowers?

A. They were of the same price, corresponding size.

Q. Corresponded in price?

A. Yes sir.

Q. Was this or not true when you traveled for the Deering Harvester Company?

A. I never had an oportunity to see my competitors' contracts, but in some cases there was a difference in price.

Q. Were there any differences in the price after the organization of these companies under the name of the International Harvester Company of America?

A. No sir, except where they had some shop worn goods, or what we call carry over goods, and they wanted to dispose of them. They would then make bargain prices in order to dispose of them. All the new goods had the same price.

Q. At the time you represented the Deering Harvester Company, what machines did they manufacture?

A. They manufactured binders, mowers, rakes, corn harvesters and what is known as corn shucker- and some little cycle grinders. Those are what they had in this territory. They had some other machines in other territories that I am not familiar with.

Q. What machines did the International Harvester Company of America handle at the time you represented them?

44 A. They handled the binders, mowers, hay rakes, corn harvester and corn shockers, same as the Deering handled before, and they were adding different machines to it.

Q. What, if anything, has since been added to it?

A. The last year I was with the International Harvester Company, I think it was the last year, they took the Osborn Machine Company into their office at Louisville. It had been out up to that time, not known as a member of the International Harvester Company, at least we were not supposed to know it, and when they took that in they had a tilliage line of tools, such a- harrows etc.

Q. Since that time have they put in any other machinery?

A. Yes sir, cream separators, gasoline engines, however gasoline engines were in at the time I refer to.

Q. What original companies, if any, organized and went into the International Harvester Company?

Objected to—overruled, to which defendant excepted.

A. The first company that I know of was the Deering, McCormick, Plano, Champion and Milwaukee.

Q. Do you know whether or not D. M. Osborn & Company was in it?

A. I don't know that they were, not until their line was added there in Louisville. I think it was the last year I worked for them which was 1903 or 1904, I don't remember which.

Q. How many years, Mr. Gill, have you been employed by the Brinley Hardy people?

A. It has been five years the first of this July since the date of my first contract, but one year of that time I was not in their employ.

45 Q. In what business were you employed that year?

A. I was in the retail hardware and implement business here.

By J. C. Browder: What year was that?

A. 1908 (1909).

Q. How long after you ceased to represent the International Harvester Company of America before you began work with the Brinley Hardy people?

A. My contract expired with the International Harvester Company on December 17th of either 1903 or 1904 and I began working with the Brinley Hardware Company July 1st of the following year.

Q. You say it will have been five years the first of this July?

A. Yes sir.

Q. Then you ceased to work with the International Harvester Company on December 17, 1904?

A. That is my recollection.

Q. Now Mr. Gill, at the time you represented the Deering Harvester Company did it have its headquarters and place of business or places of business at various places throughout this country, when it had business in different states?

A. Yes sir.

Q. State whether or not the other similar concerns also had similar places of business?

A. During my employment with the Deering Machine Company I had headquarters part of the time at Evansville, Indiana, and the other machine companies had representatives there, what are called

general agents, and part of the time my headquarters were in Louisville and the other machines were represented there. They were the only two cities I worked out of.

46 Q. When you represented the International Harvester Company did it or not have headquarters and separate places of business throughout the country, similar to the arrangement of the Deering Harvester Company when you represented that concern?

A. Yes sir.

Q. State whether or not the Deering Harvester Company, the Milwaukee Harvester Company, or the Champion Machine Company or any of those concerns had separate places of business during the time you represented the International Harvester Company?

A. During the time they represented the Deering Division, the McCormick division, the Milwaukee division, the Plano division, and the Champion division, they all had separate offices, and during the year 1902, — my best recollection that is the right date, the business was all put into one office in Louisville.

Q. What business was this that was put into one office?

A. All of the different machines that were sold, all went out of the same office, the McCormick, the Deering, the Milwaukee, the Champion and Plano. They had one office for the sale department of all that business.

Q. This was at the time of the organization of the International Harvester Company of America?

A. The divisions were all represented at that time, there were five general agents at that time, at the time of the organization of th International Harvester Company, and then in 1902 instead of there being five general agents or agencies, it was all contracted into one office. The five divisions all came together in one office.

Q. Where were these all put together in one office or one place of business?

47 Objected to—overruled, to which defendant excepted.

A. It was told us——

Objected to—overruled, to which defendant excepted.

By the COURT: You can give any instruction from your company on that subject.

Q. State what your instructions were?

A. Objected to—overruled, to which defendant excepted.

A. It was told us that it would save a lot of expense and rent was cut down, the office work was cut down and it saved the expense of running five different houses and five general agencies, and cutting down of force in general.

Q. State whether or not after that time the business was handled through one office that had previously been handled through the five offices or general agencies?

A. Yes, sir.

Q. During the time that these separate concerns had their separate agencies and offices, did they have separate traveling salesmen and representatives or not?

Objected to—overruled, to which defendant excepted.

A. Yes, sir, they had a separate set of representatives.

Q. How many representatives did they have after the consolidation of these five general agencies into one?

A. The blockmen for a number of counties had five different machines, five lines of machines, what I mean by that he contracted with the local dealer for all of them. As to the canvassers, one canvasser might come here and sell one line of machines and go to Albionsville and sell another line of machines. That was after
48 the Deering division, the McCormick Division, the Milwaukee division, the Plano division and the Champion division had all been concentrated into one office.

Q. Then they had only one set of traveling agents instead of five, is that true or not?

A. Yes, sir, that is true.

Q. Mr. Gill, did you or not have any instructions or information from your company, the Deering Harvester Company, as to why the International Harvester Company was organized, and what its purposes were?

Objected to—sustained, to which plaintiff excepted.

By the Court. That would necessarily be a declaration of some agent. Of course he might state, as he has been permitted to state, the instructions given him along the line in the course of this organization, but any statement as to why would necessarily come from some agent and would necessarily be hearsay.

Cross-examined by J. C. Browder, attorney for defendant.

Q. You say you have not had any connection with the Deering or the International Harvester Company or any of those companies since the year 1904?

A. That is my recollection about the dates.

Re-examined by J. R. Mallory, attorney for Commonwealth.

Q. Does the company you represent handle mowers, binders or machinery of that kind, the company you are representing at present?

A. We don't handle any finished machinery, that is we handle some of the parts, but not any of the finished machinery.

49 Q. Mr. Gill, do you know something of the constituency, the make up of the machines manufactured by the different companies?

A. I did know them prior to 1904, had some experience with two of them last year, but not as well acquainted with them as I was before 1904.

Q. State what differences there are in the make up of the binder

manufactured by these different companies, or rather under the different names?

A. They are all one virtually. They may have a different way of elevating their grain, little different degree of elevation about it, or they may operate the same parts of the machinery differently, and some of the machines are heavier than the others.

Q. Has some of them or not little devises and improvements about them that the others have not?

A. They had prior to 1904.

Q. What machines did you handle last year?

A. Milwaukee and McCormick.

Q. They are two of the machine companies you have been talking about?

A. Yes, sir.

Q. State to the jury whether or not there was any difference in the make up of those two binders?

A. The Milwaukee has what is known as the closed in elevator and the McCormick has the open rear elevator. The Milwaukee has the binder in the rear while the McCormick has it in front. The open rear elevating machines are the latest improved machines, and the closed in elevating machines are the old style

50 Q. Then the McCormick machine had this improvement while the Milwaukee did not?

A. They make a Milwaukee with the open rear machine, but we didn't handle that machine.

Q. What was the difference in the price of those machines?

A. None.

Q. They sold at the same price?

A. Yes, sir.

Q. And sold by whom?

A. International Harvester Company.

Q. International Harvester Company of America?

A. Yes sir.

Q. Did the McCormick Machine Company have any traveling representative during that time, or salesman during that time?

A. We had a blockman there with us.

Q. Blockman of what Company?

A. International Harvester Company. He sold us the McCormick and Milwaukee machines.

Q. Sold you both of them?

A. Yes sir. And when they sent a canvasser down to work with us *and* he sold both of them, either the Milwaukee or McCormick, whichever we wanted sold.

Q. He was the man that went with you to see the farmers?

A. Yes sir.

Q. You stated this forenoon that prior to the formation of the International Harvester Company you represented the Deering Harvester Company in various capacities?

A. Yes sir.

51 *A. Yes sir.*

Q. I will ask you what was the rule of the company during

that time relative to furnishing an expert to agents to assist in setting up the machinery, binders and mowers, when they sold them?

A. There was a rule and has been the rule of these companies since the Deering became consolidated with the International Harvester Company. Up until 1904 we furnished experts, that was my last connection with them. We furnished experts to set up the machines or gave them any assistance they wanted up to that time.

Q. What has been the rule of the International Harvester Company since that time?

A. I don't know that I can answer that, except my connection last year with them.

Q. If you know from your connection last year with them answer it?

A. We paid for their experts we had last year. We had a contract, so much with an expert or so much without an expert.

Q. And you paid for the experts extra?

A. Yes sir.

Q. Thereupon the Commonwealth introduced in person the witness, J. L. Orr, who testified orally in open court for the Commonwealth upon said trial; and likewise introduced in person the witness, H. C. Miller, who testified orally in open court for the Com-
52 monwealth upon said trial. The testimony of said J. L. Orr and said H. C. Miller fully appears in the stenographer's report of evidence heard upon said trial made by the official stenographer of this court, and which fully appears in said transcript, all of which is hereby made a part of this bill of exceptions as if copied herein. The Commonwealth likewise introduced in evidence a statement or certificate executed by the Secretary of State of this Commonwealth, which said statement or certificate was marked filed and made a part of the record herein. And this was all the evidence offered or introduced by or on the part of the Commonwealth, the plaintiff herein, upon the trial of this cause.

At the conclusion of said evidence for the Commonwealth, the defendant moved the Court to direct the jury peremptorily to find a verdict for it, to which motion the plaintiff objected, and thereupon the court overruled said motion and declined to so direct said jury, to which decision of the court in overruling said motion the defendant excepted and still excepts.

Thereupon the defendant introduced as evidence the deposition of W. B. Edgar in its behalf upon said trial, which said deposition is in words and figures as follows, to-wit:

WILLIAM B. EDGAR, being first duly sworn, answers said interrogatories as follows:

Interrogatories 1. State your name, age, residence and occupation.

Answer to Interrogatory #1. My name is William B. Edgar. My age is forty-eight. My residence is 1358 Kenwood Park Place, Chicago, Illinois. My occupation is that of assistant manager of the purchasing department of the International Harvester Company.

53 Interrogatory 2. What connection, if any, have you with the defendant, International Harvester Company of America? And if you state you are now employed by the defendant, what position do you hold and what are your duties in such position?

Answer to Interrogatory #2. I do not have any connection with the International Harvester Company of America.

Interrogatory 3. Do you know what farming machinery is sold or handled, or has been handled or sold, by the defendant, International Harvester Company of America in the State of Kentucky? If so, please state?

Answer to Interrogatory #3. I know that the International Harvester Company of America handles and sells farm machinery in Kentucky that is manufactured by the International Harvester Company, and sold to the International Harvester Company of America. The International Harvester Company manufactures all the mowers, reapers, harvesters and binders that are sold by the International Harvester Company of America in Kentucky.

Interrogatory 4. Do you know what material is used, or the kind and character of material used, in the construction of the farming machinery referred to in the last above interrogatory? If so, state.

Answer to Interrogatory #4. Yes, I know the kind and character of material used. The kind of material used is wood, iron, steel, canvas and leather. The character of it is such as has been in use by manufacturers of such machinery for a great many years.

Interrogatory 5. What experience, if any, have you had in purchasing raw material of the kind, quality and character men-
54 tioned in the last above interrogatory?

Answer to Interogatory #5. I have had experience in purchasing such material since 1902.

Interrogatory 6. Do you know, either from your personal knowledge or from the records in your office, what the reasonable market value of such raw material has been since and including the year 1902? If so, please state. Has there been an advance or a decline in price? State fully.

Answer to Interrogatory #6. Yes, I know, both from personal knowledge and from the records of the purchasing department of the International Harvester Company, what the reasonable market value of such raw material has been since and including the year 1902; and I also know that there has been considerable advance in the price. The cost of lumber that enters into the manufacture of the harvesters and binders and mowers that have been sold in Kentucky advanced in price from 1902 to 1908 about 23 per cent on pole stock, about 41 per cent on hardwood lumber, and about 16 per cent on crating lumber; and these advances are not materially different at the present time, but, if anything, are a little higher now than they were then. The cost of steel that goes into construction of the harvesters and binders and mowers that are sold by the International Harvester Company of America in Kentucky has increased from 1902 until 1908 almost 32 per cent, and at the present time the increase over 1902 is at least 17 per cent. The cost of pig iron that goes into the construction of the same machines has

increased in price from 1902 to 1908 about 23 per cent, and at the present time the increase in the cost over 1902 is about 20
55 per cent. The cost of cotton duck that goes into the canvass used on harvesters and binders, sold in Kentucky, has increased from 1902 until 1908 about 41 per cent, and at the present time the increase over 1902 is about the same. The cost of leather straps on aprons on the harvesters and binders, sold in Kentucky, has increased from 1902 until 1908 about 80 per cent. The International Harvester Company's use of straps of this kind on harvesters and binders amounts to about half a million pounds annually, and even in Kentucky it would not be a small item.

Interrogatory 7. Do you know anything in regard to the character of the labor used and employed in the making or manufacturing of the farming machinery above mentioned, and the cost or price of such labor entering into the construction of such machinery; if so, state whether the cost of such labor has increased or declined since and including the year 1902, and the extent of such advance or decline. Please state fully.

Answer to Interrogatory #7. I only know that the cost of labor used and employed in the making or manufacturing of farm machinery such as we have been talking about has increased substantially since 1902, but I am not sufficiently advised to undertake to give the percentage of increase.

Interrogatory 8. Do you know whether or not the defendant has made any advance or increase in the selling price of said farming machinery in the State of Kentucky, since and including the year 1902? If you say there has been such increase or advance in prices, then state when the same occurred and why it was made?

Answer to Interrogatory #8. I do not know and I am not in a position to know.

56 Cross interrogatories:

Interrogatory #1. What is the amount of the capital stock of the corporation, International Harvester Co. of America?

Answer to Cross Interrogatory #1. One million dollars.

Interrogatory #2. Do you own any of the capital stock in this company? and, if so, how much?

Answer to Cross Interrogatory #2. No.

Interrogatory #3. How long have you been in the employ of the International Harvester Company of America, and in what capacity or capacities?

Answer to Cross Interrogatory #3. I never have been in the employ of the International Harvester Company of America.

Interrogatory #4. What original corporations or companies engaged in the manufacture of harvesting machinery and farming implements now constitute the corporation known as The International Harvester Company?

Answer to Cross Interrogatory #4. I do not know whether any original corporations constituted the corporation known as the International Harvester Company or not, but I have been informed that the same kind of machines that were formerly manufactured by

the McCormick Harvester Machine Company, the Deering Harvesting Company, the Warder, Bushnell & Glessner Company, the Plano Manufacturing Company and the Milwaukee Harvester Company are now being manufactured by the International Harvester Company.

Interrogatory #5. Did you or not prior to your employment by the International Harvester Co. of America work for one of these companies, or were you in any wise interested in any one of
57 same, and, if so, in what capacity and to what extent?

Answer to Cross Interrogatory #5. I never was in the employ of the International Harvester Company of America, but before my employment by the International Harvester Company I was in the employ of the Warder, Bushnell & Glessner Company, of Springfield, Ohio, as one of its sales managers. The extent of my connection with the Warder, Bushnell & Glessner Company was only that of an employee.

Interrogatory #6. Please enumerate the constituent elements of
8 McCormick mower. You will give the amount of wood, and the kind of wood, the amount of steel, and the kind of steel, the amount of wrought or cast iron that is contained in this machine.

Answer to Cross Interrogatory #6. There is in a McCormick mower about 31 feet of lumber or wood, and it is all what is called hard-wood and pole stock. The amount of steel in a McCormick mower is about 200 pounds, consisting of Bessemer and open hearth steel. The amount of cast and malleable iron that is contained in
8 McCormick mower is about 500 pounds.

Interrogatory #7. Now state the market value of each product contained in this machine during each of the years 1902 and 1908 inclusive?

Answer to Cross Interrogatory #7. The market value of each product contained in a McCormick mower during each of the years 1902 to 1908, inclusive, is shown on a typewritten statement which I now hand to the Notary Public, with request that it be attached to my deposition as my answer to cross-interrogatory #7, marked A, and bearing my signature.

58 Interrogatory #8. Please enumerate the products contained in the manufacture of a binder, the McCormick or Milwaukee, giving the amount of each product contained in the machine, and the market value of each of these products for each year 1902 to 1908 inclusive?

Answer to Cross Interrogatory #8. The products contained in the manufacture of a McCormick binder, and the market value of each of them for each year from 1902 to 1908 inclusive, are as stated in the paper hereto handed to the Notary Public with the request that he attach the same to my deposition as my answer to cross-interrogatory #8, marked Exhibit B, and bearing my signature.

In a six foot McCormick harvester and binder there is about 263 pounds of gray iron, 286 of malleable iron, 813 pounds of steel, 10 yards of cotton duck, 23¼ pounds of leather straps, 142 feet of pole stock and hard wood-lumber, 63 feet of crating lumber.

Interrogatory #9. What was the market value of a completed Mc-

Cormick mower of popular size each year 1902 to 1908 inclusive? and what was the market value of a McCormick or a Milwaukee binder of popular size during the harvesting season of each of said years in Kentucky?

Answer to Cross Interrogatory #9. I do not know and have not been in any position to know.

Interrogatory #10. Does the International Harvester Co. of America or not control the entire output of agricultural implements and farm machinery of the McCormick Harvester Co., of the Deering Harvester Co., of the Milwaukee Harvesting Machine Co., of the Champion Machine Co., of the D. M. Osborn Co., and Plano Machine Co.?

59 Answer to Cross Interrogatory #10. From the best information I have the McCormick Harvester Company, the Deering Harvesting Company, the Warder Bushnell & Glessner Company, (sometimes known as the Champion Machine Company), D. M. Osborn & Company and the Plano Manufacturing Company have not had any output for a good many years. It is my information and belief that they do not manufacture or sell anything.

Interrogatory #11. Does any one of the above named six concerns have a traveling salesman or representative in Kentucky? or are all these companies and concerns represented by the salesmen and representatives of the International Harvester Co. of America?

Answer to Cross Interrogatory #11. I do not know that they have or have not, but I think not. They are not represented by the salesmen and representatives of the International Harvester Company of America.

Interrogatory #12. How many headquarters or principal places of business has the International Harvester Company of America of Kentucky as a distributing point, where the products of its concerns are stored in large quantities and from which distributions are made throughout the State of Kentucky?

Answer to Cross Interrogatory #12. I do not know and I am not in a position to know, but I have heard that the company does business at Louisville and has a general agency there.

WILLIAM B. EDGAR.

STATE OF ILLINOIS,
County of Cook:

60 I, James Abbott, a Notary Public within and for the State and County aforesaid, certify that the foregoing deposition of William B. Edgar was taken before me at the time and place and for the purpose in the caption stated, pursuant to interrogatories hereto attached; that said witness was first duly sworn to tell the truth, the whole truth, and nothing but the truth; that said deposition was taken by me in shorthand, and the foregoing is a true and correct transcript of my notes; that neither party was present in person or by counsel; that said deposition was read over to and subscribed by the witness in my presence.

Witness my hand this 13th day of April, A. D., 1911.

My commission expires November 18, 1911.

JAMES ABBOTT,
Notary Public Cook County, Illinois.

EXHIBIT "A."

	1902	1903	1904	1905	1906	1907	1908
Grey Iron Gross Ton	$13.50	$17.52	$17.19	$14.91	$16.35	$20.70	$16.67
Malleable Bess Gross Ton	14.50	19.56	17.08	15.90	16.92	21.84	17.02
Steel Cwt	1.35	1.65	1.765	1.465	1.515	1.665	1.78
Pole Stock 1,000 ft	26.00	26.00	28.00	35.00	37.50	37.50	32.00
Hardwood Lbr. 1,000 ft	25.50	32.00	32.50	35.00	36.50	38.00	36.00
Crating Lbr. 1,000 ft	9.00	8.00	9.00	10.00	10.50	13.00	10.50

W. B. EDGAR.
WILLIAM B. EDGAR.

EXHIBIT "B."

	1902	1903	1904	1905	1906	1907	1908
Grey Iron Gross Ton	$13.50	17.52	17.19	14.91	16.35	20.70	16.67
Malleable Bess Gross Ton	14.50	19.56	17.08	15.90	16.92	21.84	17.02
Steel Cwt	1.35	1.65	1.765	1.465	1.515	1.665	1.78
Pole Stock 1,000 ft	26.00	26.00	28.00	35.00	37.50	37.50	32.00
Hardwood Lbr. 1,000 ft	25.50	32.00	32.50	35.00	36.50	38.00	36.00
Crating Lbr. 1,000 ft	9.00	8.00	9.00	10.00	10.50	13.00	10.50

W. B. EDGAR.
WILLIAM B. EDGAR.

62 Thereupon the defendant introduced the witnesses, W. J. Garrod, William Quiggins and M. C. Ronayne, each of whom testified orally in open court for the defendant on the trial of said cause. The testimony of said three witnesses fully appears in the stenographic report of the evidence heard upon said trial and made by the official stenographer of this court, which said transcript of evidence made by said stenographer is hereby made a part of this bill of exceptions as if copied herein. And this was all the evidence offered or introduced by the defendant on the trial of said cause. Said transcript of said evidence made by said official stenographer fully shows all the objections, exceptions, avowals and rulings of the court thereon made or had throughout said entire trial, to which reference is here made.

At the conclusion of all of said testimony the defendant again moved the court to direct the jury peremptorily to find a verdict for it, to which motion the plaintiff objected, and the court overruled said motion, to which decision of the court in overruling said motion and in declining to peremptorily instruct the jury to find for the defendant, defendant at the time and still excepts.

63 I, W. P. Sandidge, Judge of the Seventh Judicial District of Kentucky and of the Todd Circuit Court, being the trial Judge who presided at the trial of the above styled cause, do hereby certify that the foregoing bill of exceptions has been this day examined by me, and same is hereby approved as the true and correct bill of exceptions had upon the trial of this cause.

Witness my hand as Judge of the Seventh Judicial District of Kentucky and of the Todd Circuit Court, this 14th day of December, 1911.

W. P. SANDIDGE,
Judge of the Seventh Judicial District of Ky.
and of the Todd Circuit Court.

Filed of Record December 14th, 1911.

JNO. A. GOODMAN,
Clerk Todd Circuit Court.

64 Todd Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
INTERNATIONAL HARVESTER COMPANY OF AMERICA, Defendant.

Schedule.

The Clerk of this Court is hereby directed to copy for the purpose of an appeal all the record in this cause, except the summons and subpœnas.

This 14th day of December, 1911.

INTERNATIONAL HARVESTER COMPANY OF AMERICA,
By ATTORNEYS.

Filed of Record December 14th, 1911.
JNO. A. GOODMAN, *Clerk.*

65 *Supersedeas Bond.*

STATE OF KENTUCKY,
Todd County:

Todd Circuit Court.

THE INTERNATIONAL HARVESTER COMPANY OF AMERICA, Appellant,
vs.
THE COMMONWEALTH OF KENTUCKY, Appellee.

Upon Appeal from a Judgment of this Court Rendered 6th Day of Dec., 1911.

Whereas, Said Appellant has taken an appeal from the judgment of this Court rendered on the 6th day of December, 1911, against The International Harvester Company of America in favor of the Appellee for the sum of ($2,500.00) Twenty-five Hundred Dollars, which judgment is in words and figures as follows: Wherefore it is adjudged by the Court that the plaintiff, the Commonwealth of Kentucky, recover of the defendant, The International Harvester Company of America, the sum of Twenty-five Hundred Dollars ($2,500.00) and her costs herein, and the Appellant desire- to supersede said judgment.

Now, we, The International Harvester Company of America, and United States Fidelity and Guaranty Co. surety, do hereby covenant to and with the Appellee, The Commonwealth of Kentucky, that the Appellant will pay to the Apellee all costs and damages that shall be adjudged against the Appellant on the appeal, and also that they will satisfy and perform the said judgment in case it shall be affirmed, and any judgment or order which the Court of Appeals may render, or order to be rendered by the inferior
66 Court, not exceeding in amount or value the judgment aforesaid, and also pay all rents, hire or damage which, during the pendency of the Appeal, may accrue on any part of the property of which the Appellee is kept out of possession by reason of the appeal.

Witness our hands, this 18th day of December, 1911.

UNITED STATES FIDELITY AND GUARANTY COMPANY,
By JAS. R. MALLORY, *Att'y-in-Fact, and*
W. J. PENICK, *Att'y-in-Fact.*

Attest:
JNO. A. GOODMAN, *Clerk.*

Filed 19th day of December, 1911.
JNO. A. GOODMAN, *Clerk.*

Supersedeas and copy issued and copy filed in papers of action, Dec'r 19th, 1911.
JNO. A. GOODMAN, *Cl'k.*

67 COMMONWEALTH OF KENTUCKY:

Todd Circuit Court.

THE INTERNATIONAL HARVESTER COMPANY OF AMERICA, Appellant,
vs.
THE COMMONWEALTH OF KENTUCKY, Appellee.

Supersedeas.

I do hereby certify that an appeal has been granted by the Todd Circuit Court from a judgment rendered at its December term, 1911, in favor of the Commonwealth of Kentucky, appellee, against the International Harvester Company of America, appellant, for the sum of Twenty-five Hundred ($25,000.00) Dollars and costs in said action and that a supersedeas bond has been executed.

Therefore, the appellee and all others are commanded to stay proceedings on the judgment above recited.

Witnes my hand as Clerk of said Court, this 19th day of December, 1911.

JNO. A. GOODMAN,
Clerk Todd Circuit Court.

68 STATE OF KENTUCKY,
County of Todd, set:

I, Jno. A. Goodman, Clerk of the Todd Circuit Court, in and for the State and County aforesaid, do hereby certify that the foregoing transcript is a true and correct copy, according to the truth, of the entire record in the cause had in the Todd Circuit Court wherein the Commonwealth of Kentucky was plaintiff and The International Harvester Company of America was defendant, except the summons and subpœnas, as directed by schedule.

Witness my hand as Clerk of the Todd Circuit Court, this 19th day of December, 1911.

JNO. A. GOODMAN,
Clerk of the Todd Circuit Court.

The following is the transcript of the evidence filed as aforesaid:

69 Todd Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
INTERNATIONAL HARVESTER COMPANY OF AMERICA, Defendant.

Transcript of Testimony.

Be it remembered that on the trial of the above styled case at the December Term, 1911, of the Todd Circuit Court, being December 4th, 1911, the following evidence was heard on behalf of the Commonwealth.

The following certificate was produced and read to the jury:

"Statement of Corporation."

"To the Secretary of State, Frankfort, Ky.

SIR: Notice is hereby given that the place of business for the International Harvester Company of America (a corporation of the State of Wisconsin) in Kentucky is located at the Northwest Corner of 13th and Maple streets in the city of Louisville, and that J. L. Gardner, of Louisville, Ky. is our agent—thereat, upon whom process may be served in any suit that may be brought against our Company within the State of Kentucky.

70 Done at Chicago, Illinois, this 7th day of October, 1911.

[SEAL.] R. C. HASKINS, *President.*

Indorsed by the Secretary of State as follows: "Filed and recorded October 11th, 1910. Ben L. Bruner, Sec'y of State."

"COMMONWEALTH OF KENTUCKY:

Office of the Secretary of State.

Certificate.

I, Ben L. Bruner, Secretary of State for the Commonwealth of Kentucky, do certify that the foregoing writing has been carefully compared by me with the original record thereof, now in my official custody as Secretary of State and remaining on file in my office, and found to be a true and correct copy of statement filed by the International Harvester Company of America in compliance with Sec. 571, Kentucky Statutes.

In Witness Whereof, I have hereunto set my hand.

Done at Frankfort this 14th day of June, 1911.

BEN L. BRUNER,
Secretary of State,
By R. A. COOK,
Assistant Secretary of State."

Rec'd by mail in sealed envelope and filed, June 16th, 1911.

JNO. A. GOODMAN, *C. T. C. C.*

71 By Mr. JAS. R. MALLORY, Commonwealth's Attorney:

Gentlemen of the jury it is agreed that this is the deposition of Mr. M. W. Gill and that he would testify to this if here present.

(Thereupon the same was read to the jury, and is copied in the bill of exceptions herein.)

The next witness, J. L. ORR, called in behalf of the Commonwealth, testified as follows:

Direct examination by Mr. J. R. MALLORY:

Q. Your name is J. L. Orr?
A. Yes sir.
Q. Where do you live, Mr. Orr?
A. Allensville.
Q. What's your business?
A. Grocery and implement business.
Q. How long have you been engaged in the implement business in Allensville?
A. Well, directly and indirectly, twenty-nine or thirty years.
Q. Off and on during all this time in Allensville, Todd County, Ky.?
A. Yes sir; I was on the road ten years.
Q. Did you sell mowers and reapers, binders, hay rakes and implements of that kind prior to 1902 in Todd County, Ky.?
A. Yes sir.
Q. What Company or Companies did you represent in this County prior to that time?
72 A. I represented the Deering.
Q. The Deering Harvester Company?
A. I believe it was the William Deering Company at first.
Q. And then The Deering Harvester Company?
A. Yes sir.
Q. Do you remember how many years you represented that Company in this County?
A. I think from 1897 to 1902, possibly.
Q. Did you sell the reapers and mowers manufactured by that Company?
A. Why, yes sir.
Q. Did they have a place of business in Kentucky, distributing point?
A. At that time?
Q. Yes?
A. Yes sir.
Q. Where was it?
A. Louisville, Ky.
Q. Have they since 1902 had a distributing point or place of business in Kentucky?
A. Well, I think not; I think now it's the International Harvester Co.; they have one.
Q. State whether or not prior to 1902, while you were selling the Deering line, there were other Companies engaged in a similar business, in competition with that Company?
A. Oh, yes sir.
Q. What other Companies?
A. Well, the Milwaukee and Champion, Osburn, Wood, Buckeye.

73 Q. McCormack?
A. McCormack.
Q. These other companies engage- in business in Todd County?
A. Part of them were, yes sir.
Q. Part of them?
A. Yes sir.
Q. State whether or not they had their traveling salesmen?
A. Oh, yes sir.
Q. Representatives?
A. Yes.
Q. Did the traveling salesmen and representatives of these respective Companies call upon you to sell you their lines of machinery?
A. Well, I couldn't say that more than one did.
Q. You remember that at least one did?
A. Yes.
Q. Remember what Company that one represented?
A. D. M. Osburn.
Q. Osburn & Co.?
A. Yes sir.
Q. But, as a matter of fact, during those years all these different Companies had their traveling salesmen and representatives in this territory, didn't they?
A. Yes sir—that is most of them did.
Q. That is what I mean, some of them did?
A. Yes sir.
Q. There was competition among these Companies?
A. Yes sir.
74 Q. Each one was striving to get the business?
A. Oh, yes sir, just like we do now.
Q. And were endeavoring where they could to get it?

Objected to as leading.

By the COURT: Yes, don't lead him.

Q. You may state whether or not the different Companies during those years tried to take up the agency of one Company and establish their agency in its stead?
A. I have never known them to try to do that with me with but one exception, the Osburn, and I never thought much of that.
Q. You continued to sell for the Deering people?
A. Yes.
Q. Since 1902 what Companies have had their traveling salesmen and representatives in this territory?
A. Why, the International Harvester Company.
Q. Has the McCormack Harvester Company had a salesman?
A. No, I had a contract for the McCormack and Deering for two years.
Q. Well, did the McCormack Harvesting Machine Co. have a salesman?
A. No, the International Harvester Co.

Q. The International Harvester Co. sold McCormack machines?
A. Yes.
Q. And the Deering?
A. Yes.
Q. What other machines did they sell?
A. Five or six others; Plano, Osburn, Milwaukee.
Q. Haven't they more than that?
75 A. Possibly they have; may have them all for what I know.
Q. Did you sell any binders or mowers, or were you the agency for any Company other than the Deering prior to the formation of the International Harvester Company?
A. Yes, I sold the Milwaukee two years and the McCormack—I traveling for them ten years; I was with Mr. Haddox there about eight years.
Q. These different machines were sold at Allensville?
A. Yes sir.
Q. Now, did you have the agency for these Companies all at one time?
A. Oh, no.
Q. You would have the Milwaukee one year and possibly the McCormack one year?
A. The two years I was at Olmstead I had the Milwaukee machine.
Q. State whether or not prior to 1902 in towns where there was competition, merchants in the same town selling these things,—whether one merchant would have the agency for one of these Companies and another merchant would have the agency for another Company?
A. Yes.
Q. What has been the rule in that respect since 1902?
A. Well, there was nobody in my town that wanted an agency that I know of; I was the only one and they wouldn't let me have but one machine.
Q. You continued to sell the Deering, I believe,—under a contract made with the International Harvest- Company?
A. Yes; part of the time I bought it and part of the time
76 on commission.
Q. They made either kind of contract with you, to sell to you outright or a commission contract?
A. Part of the time they would and part of the time they wouldn't. Sold straight out a couple of years.
Q. They had different plans in different years?
A. Yes sir.
Q. Sometimes they would give you a commission contract and sometimes they wouldn't?
A. Well, they never refused either year; way I bought was by taking a cash contract,—when I had the money I done that.
Q. What I was asking you was whether or not since 1902 you could make either contract with them?
A. Yes sir, it has been that way; last year we took a commission

contract, handled them on commission; wasn't so much money in the cash price as there was a time prior.

Q. Since 1902, if I understand you, the traveling representatives of the International Harvester Company sold all these machines that you have named as having gone into the International Harvester Company?

A. That is my understanding.

Q. They consist of the McCormack Harvester Machine Co., Deering Harvester Co., Plano Manufacturing Co., Champion Machine Co., D. M. Osburn & Co.

A. Yes.

Q. And possibly others?

A. Yes.

Q. Put these six Companies all in one?

77 Objected to as leading, and objection sustained.

Q. I will get you to state, Mr. Orr, as far as you know the number of companies and names of the companies in the International Harvester Company of America?

A. Well, the McCormack and the Deering and the Plano, Champion, Osburn; I think they absorbed the Buckeye.

Q. Milwaukee in it?

A. Yes sir, Milwaukee.

Q. State whether or not they sell all these machines you have named?

A. Yes sir.

Q. How do they sell them in respect to the towns they go to?

A. I suppose anybody they could.

Q. Can as many people in one town get an agency as want it?

A. No.

Q. What is the rule about that?

A. One man in a town,—one machine.

Q. What are the prices of the different machines?

A. All the same, I understand. I have never had occasion to ask about that; never investigated, don't know.

Q. Have you since the organization handled more than one of their lines of machines?

A. No. I told you I handled the McCormack and Deering for two years.

Q. What was the difference in the cost price in these two machines?

A. None at all.

Q. The price was the same on each machine of the same class?

—. ——.

78 Q. Do you remember the cost price of those machines?

A. Yes, they figure about $103 and may be seventy cents.

Q. On what kind?

A. Seven foot machine.

Q. Seven foot binder?

A. Yes, I think that was it; wouldn't be positive; it wouldn't vary a dollar either way.

Q. And what was the cost price of the mowers?

A. Five foot, about $38.00.

Q. Five foot mowers in both companies cost the same?

A. Yes.

Q. And this is the same of the Deering and McCormack binders?

A. I think it was.

Q. You remember what year it was, Mr. Orr, you handled both of those machines?

A. No sir, I do not; I think possible 1904 and 1905 maybe.

Q. Some five or six years ago?

A. I think so; I didn't refresh my memory when I started up here to see.

Q. What did the Deering binder cost you prior to the organization of the International Harvester Co.?

A. $95.00 and $100.00.

Q. What machines cost you $95.00 and $100.00?

A. Seven foot,—$95.00 cash, $100.00 in notes.

Q. Did you handle that same machine last year?

A. Yes sir.

Q. What did it cost you last year?

A. I told you awhile ago about $103.00.

Q. Last year?

79 A. Yes sir.

Q. I thought you said awhile ago that was what they cost you when you handled both machines, five or six years ago?

A. There hasn't been any change slightly, at all, except in 1909 they took off $3.00.

Q. What was that taken off for?

A. They wanted to reduce the price to the farmer, or me one.

Q. Now, don't you know what they took that $3.00 off for?

A. No, I do not.

Q. Don't you know they took that off because they quit sending out a man to set them up?

A. No, sir, I don't know.

Q. And don't you know your contract provides that?

A. Objected to.

A. They have always allowed me $3.00 for setting up machines.

Q. They have done that all the time every year?

A. Yes sir.

Q. Did you buy any machines from the International Harvester Company of America last year, Mr. Orr—any machines from the International Harvester Company of America?

A. Did I buy any machines?

Q. Yes?

A. Yes sir.

Q. Do you know how many and what kinds?

A. I bought binders and mowers.

Q. Do you know the number of binders you bought last year,—within one year prior to the 2nd day of March, 1911?

80 A. I couldn't say positively; I could tell you what I done this year.

Q. Well, did you buy any machines from the International Harvester Company within one year prior to March 2nd, 1911?

A. Yes sir; yes sir.

Q. What kind of machines did you buy?

A. Binders and mowers, hay rakes.

Q. What size binders and what size mowers?

A. We handled all seven and eight foot binders.

Q. What did a seven foot binder cost you?

A. About $103.

Q. That was the list price of it?

A. No sir.

Q. Well, what was the list price of it?

A. $117.50.

Q. What was the list price of the eight foot binder?

A. $138.00.

Q. How do you figure that binder cost you $103.00?

A. Take five off, three dollars off, 2% and 5% off; they give those discounts.

Q. That is the contract you had,—listed and sold to you at $117.50?

A. The discount was 5% off and 2% off,—figure it there and see if I am not correct.

Q. And after you took advantage of these provisions in this contract you had with them, your machines cost you, seven foot machines, cost you $103.70?

81 A. Something around that, yes sir.

Q. What did an eight foot machine cost you?

A. The same discount off on an eight foot machine.

Q. That was listed at what?

A. $138.00.

Q. Did you buy any corn harvesters?

A. No, sir.

Q. This was the Deering machine you are quoting from?

A. Yes.

Q. Can you tell what they cost you any year prior to last year, 1910?

A. I say it vary-s little.

Q. The list price is the same every year?

A. No, not exactly; it was $120.00, if I recollect correctly one year.

Q. That was in 1908, wasn't it?

A. I think possibly it was; I wouldn't say for certain.

Q. Did you buy any hay rakes last year?

A. Why, yes I bought hay rakes.

Q. From the International Harvester Company of America?

A. Yes.

Q. What rakes did you handle?

A. Deering.
Q. What did they cost you?
A. They cost me about something like $14.00.
Q. What were they listed to you at?
A. Listed at $18.00, I believe it was, Mr. Mallory.
82 Q. You know what size rake that was?
A. 8½ foot rake.
Q. Do you know what a seven foot Deering binder cost you in 1902?
A. No, I don't recollect.
Q. Along about that time, do you remember the cost any year about that time?
A. I declare I don't, Mr. Mallory.
Q. Did you handle last year, 1910, any five or six foot grain binders?
A. Not that I remember.
Q. Only seven and eight foot?
A. Yes.
Q. I believe you stated these were listed at $117.50 and $138.00?
A. Yes sir.
Q. And they cost you that subject to certain discounts you got under the terms of your contract?
A. Yes.
Q. What were these discounts?
A. Five per cent off—$3.00 off, 2% off and 5% off.
Q. What was that $3.00 off for?
A. For setting up the binder.
Q. Then you figured the 5% off the list price?
A. Yes.
Q. And you figured that $3.00 off?
A. Yes.
83 Q. Did that yourself?
A. Yes sir; well, the 2% is a different proposition——
Q. But you took off 5% and the $3.00 off and 2% off?
A. Yes sir.
Q. They are the discounts you get?
A. Yes sir.
Q. Now, did you get that discount and the $3.00 off that list price of $117.50?
A. Yes sir.
Q. Do you know anything about what those machines were worth last year?
A. Do I know what they were worth?
Q. Yes sir?
A. Yes, I know what they were worth.
Q. What were they worth?
A. $120.00, I think; I sold it for $120.00.
Q. I didn't ask you what you sold them for, I am asking what the real value of that machine,—what ought it to have been sold to you at?

A. I am in no position to know that; I am no manufacturer; I don't want to make a statement of that kind Mr. Mallory.
Q. You can tell what you know about it, can't you?
A. I don't know; I am in no position to know.
Q. You can say you don't know then?
A. Well.
Q. You don't know anything about the constituent elements of the machine at all, what they were worth?
84 A. I wouldn't be an expert on that, no sir.
Q. There has been an increase in the cost of these machines?
A. Yes sir.
Q. About what increase has there been in the cost of them?
A. I figure about ten per cent.
Q. Since what year?
A. Since 1902 and '3, along there.
Q. Now, has there been any increase in the supplies, cost of supplies to these machines?
A. What do you mean by that?
Q. Repairs; I meant to say repairs?
A. Well, yes sir, in a few instances; some of them lower and some higher.
Q Hasn't been any general increase in the cost of repairs has there?
A. If it cost more to make binders, it certainly cost more to make repairs; but whether they really cost any more, I don't konw.
Q. That is what I am asking, whether these repairs have cost you any more as a merchant down there?
A. Well, no, they give a better discount on that *then* they did before; some repairs the list price raised on them and the discount 30% and 25%.
Q. So it makes the repairs really cost you less?
A. Something like the same or maybe a little more; I haven't figured on them; a good many of our repairs we couldn't afford to buy.
Q. You can get those repairs from most any company?
85 A. Yes sir.
Q. There are a whole lot of companies that manufacture these repairs?
A. Yes sir.
Q. There is competition among the manufacturers of repairs?
A. Oh, yes sir, I suppose there is; we don't buy any except from the International Harvester Co.
Q. You buy yours from the International Harvester Company?
A. Because it is more convenient.
Q. How long have you been the agent and dealing in the International Harvester Company's goods?
A. Something like fifteen years.
Q. Ever since there has been an International Harvester Company?

A. Oh!—yes, about nine years of their goods; I took the Deering since I have been in business for myself.

Q. Where have they had their distributing point and headquarters?

A. For this territory?

Q. Yes?

A. Louisville.

Q. The goods all ordered from and shipped to you from Louisville?

A. Yes.

Q. Your contracts have been made with whom?

A. With the International Harvester Co.

Q. And through their general agent at Louisville?

A. Yes.

Q. Kind of a state agent, is he?

A. Yes, what they call a general agent.

86 Q. Did you make your contract with him for the year 1910, last year?

A. Yes.

Q. And bought your goods under that contract?

A. Well, now wait—his representative.

Q. Well, that's the same thing, from the Louisville office?

A. Yes.

Q. Bought your goods and paid for them through the Louisville office?

A. Yes sir.

Q. And they were delivered to you here in this County?

A. Yes.

Q. Get a car load lot?

A. Yes sir.

Q. What was the rule about the freight?

A. I think they allowed the freight in carload lots.

Q. If you got less than a carload lot——

A. I paid the freight from Louisville.

Q. A man must buy in carload lots in order to get the freight paid?

A. I think so, yes sir.

Q. Is the International Harvester Company incorporated?

A. I couldn't tell you; I guess they are; I have seen enough in the newspapers about it.

Q. Did you ever see the word "incorporated" in their letter heads?

A. I am not sure about it.

By Mr. RUTLEDGE: We will admit that, Mr. Mallory.

87 Cross-examined by Mr. J. C. BROWDER for defendant:

Q. Judge, do you know anything about the price of the raw material that goes into the construction of these machines?

A. No sir.

Q. Know anything about the kind or price of labor it takes to make them?

A. No; of course, it takes skilled labor to make good machines.
Q. You know anything about the price of that labor?
A. No sir.
Q. Where these machines are made?
A. No, sir.
Q. Do you know anything about the expenses of taxation or insurance, anything of that kind?
A. No sir.
Q. I didn't understand exactly when it was the increase was put on?
A. Increase was put on?
Q. Advance in price?
A. Along some eight or ten years ago, somewhere along there; might not have been more than five or six years ago.
Q. How many times was an advance made?
A. I don't remember but one.
Q. And that was in the neighborhood of 10% on mowers and binders?
A. In my figures I made a 10% advance over what they were before they consolidated.
Q. And that is the advance you referred to awhile ago?
A. Yes.

88 Q. I will ask you to state to the jury whether or not these machines have improved in value and general make?

A. Of course, if I didn't think it was the best machines in the world, I wouldn't handle them.
Q. The thing I want to know is whether these machines——
A. (Interposing.) —I couldn't get but one.
Q. I understand,—has that machine from time to time improved or gone the other way?
A. I think it has improved.
Q. You think it has improved?
A. Yes sir.
Q. Is it a better machine to-day than it was in 1902?
A. Yes, I would think so.
Q. More durable, lighter?
A. I would think so,—lighter.
Q. State whether or not the improved condition of these machines you have mentioned would be worth the increase or advance, in the price you have mentioned?
A. I don't know about that; if I was to figure, I would figure down to a basis of cost,—whether a machine cost fifty or one hundred dollars; that is the way to figure the matter out.
Q. You didn't understand my question; I understood you to say awhile ago you got these machines from $95.00 to $100.00 and afterwards they were increased; I want you to tell the jury whether that increase in the cost was offset by the improvement in the machine?
A. Well, I wouldn't want to say that?
Q. You don't know about that?
A. No, sir, I don't know; they have been good machines for years.

89 Q. You say you sold that machine for $120.00?
A. Yes sir.
Q. How long have you handled it all told?
A. Since '97; that is the Deering.
Q. How long have you been a general dealer in these kind of things?
A. About twenty-nine years.
Q. In your judgment is that machine worth that money?
A. Why, yes sir, I thought so, or I wouldn't want to sell it for that.
Q. Judge, do you remember what these binders sold for away back when they — first put in use?
A. Yes sir.
Q. How much?
A. $300.00, but there was a long discount on that.
Q. When was that they sold for $300.00?
A. That was in '81.
Q. Do you know whether or not the price of iron and timber and material of all sort that goes into these machines,—in this neighborhood,—have gone up or gone down since 1902?

Objected to by plaintiff.

Q. Well, elsewhere, do you know whether the price of timber has gone up or down?

A. Objected to.

By the COURT: He may state, if he knows where this timber was purchased that went into this machinery. I reckon you will have to confine it to that.

90 Q. Do you know whether the price of hickory in the raw material has gone up or gone down since 1902?

Objected to.

A. Well, I don't know about that.

Redirect examination by Mr. MALLORY:

Q. When you say this machine was worth $120.00, what do you base that on?
A. Base it on my judgment, is what I figure on; just like you would a horse.
Q. As a matter of fact ain't you basing it on what it cost you?
A. Part that, yes sir.
Q. Do you say that the cost price, to have a legitimate profit on it, ought to be worth to the user $120.00?
A. I don't know what it costs them; I think I ought to have the little profit I get out of it; I may be just a little prejudiced in my views about the Deering; the Deering binder is my preference; might pay a little more,—just like you would be about a horse.
Q. Judge, you don't have with you the contract you had with these people in 1910?

A. This year?
Q. No, last year's contract?
A. With me now?
Q. Yes?
A. No, sir.
Q. I will ask you to look over that and see if it — similar to that, same kind of printed form?

Witness looks at the paper.

91 Defendant objects.

A. Yes sir, I think that is.

The defendant objects to the introduction of said paper
By the COURT: I don't think that is proper unless you show the other paper is lost.
Plaintiff objects and excepts to the ruling of the Court.

Q. You stated awhile ago that the International Harvester Company reduced the price $3.00 on all these machines one year; do you know what year that was, was it 1908?
A. No, I am not positive.
Q. And you don't know what that $3.00 was for?
A. No, they didn't tell me; I was glad to see it come off.
Q. What did you sell the machine at that year?
A. I got $125.00 for it.
Q. You got the same discounts that year you got last year?
A. Yes sir; I don't know what year that was though, Mr. Mallory.
Q. That is the only time they have ever reduced them, prior to 1910?
A. Oh, no, they have got a better price now,—I hope.
Q. I say prior to 1910 that is the only time?
A. That is the only time.
Q. That $3.00 reduction is all you know of?
A. You mean since 1902 now?
Q. Yes?
A. I think so.

92 The next witness, H. C. MILLER, called on behalf of plaintiff, testified as follows:

Direct examination by Mr. MALLORY:

Q. Were you sworn this morning?
A. No, sir.

(Witness sworn.)

Q. Your name is H. C. Miller?
A. Yes sir.
Q. Where do you live?
A. I live in Elkton.
Q. What business are you engaged in?
A. I sell hardware and implements.
Q. How long have you been engaged in the hardware and implement business in Elkton?

A. About nineteen years.

Q. What implements during that time have you handled and sold?

A. You mean what kind of implements?

Q. Yes?

A. I have handled disc harrows, smoothing harrows, land rollers, binders, drills, hay rakes; different things.

Q. Have you during all the time you have been engaged in this business handled grain binders, rakes, mowers——

A. I have been selling those for nineteen years.

Q. What make or line of machinery of that kind have you handled, what different makes?

A. Why, I have handled the McCormack, Milwaukee and Wood.

Q. How long did you handle the Milwaukee machine?

A. About eighteen years, I think; seventeen or eighteen, I wouldn't be positive.

93 Q. You handled this machine continuously?

A. After I took it, yes sir, up until last season.

Q. Prior to 1902 from whom did you buy the Milwaukee?

A. Milwaukee Harvester Co.

Q. Do you remember where their headquarters were?

A. Seems to me it was Chicago. They had a blockman, of course, in this state,—had charge of it.

Q. Your contract prior to 1902 was made through the traveling man—did they have a state agent?

A. Yes.

Q. Your contract was made through that state agency?

A. Yes sir.

Q. Since 1902 with whom have your contracts been made?

A. International Harvester Company of America, I think is the way it is.

Q. International Harvester Company of America?

A. Yes sir.

Q. Mr. Miller, I will get you to state to the jury what other companies were in competition with the Milwaukee Machine Company if any, in this locality prior to 1902?

A. Well, the Osburn and Champion and McCormack and Deering; I don't think I ever knew of the Plano in here at that time, and I don't think anybody ever sold the Wood here up to that time. I think those was all that was in here.

Q. State whether or not during those years prior to 1902 these respective Companies had traveling salesmen and men representing them in the respective capacities?

A. All of them had their men out,—what they called blockmen, and they had canvassers they sent in during the season, for
94 instance any time we would let them know they would send us a man to go out and canvass.

Q. For what purpose?

A. Taking orders.

Q. Go to the farmers?

A. Yes, to the farmers.

Q. Prior to 1902 did these different companies you have named do this or not?

A. All of them did that, yes sir.

Q. What were the prices of the machines of the respective companies,—did they all have the same price or different price, how about that?

A. I don't know whether they all had the same prices; they didn't tell me what the prices was; I know some years it would be a little up and some a little down; cut prices then I know; we could sell a machine for less money than we can now.

Q. The canvassers would work against each other in taking these orders?

A. Oh, yes.

Q. Since 1902, I believe you stated your contract has been made with the International Harvester Company of America?

A. Yes.

Q. Since that time have these different companies you have named here had any representatives in this community?

A. None but just one man.

Q. And that one man represented what?

A. All the machines that belonged to the International Harvester Company.

95 Q. Do these machines you have named all belong to the International Harvester Company?

A. I suppose so; all claim to.

Q. Did this traveling salesman or not sell any one or all these machines?

A. Sold all of them; contract with me for one and with somebody else for another if they had an agent here.

Q. What about the prices of the machines, the McCormack and Deering and so on?

A. I notice the price of all machines has been crawling a little since about the time they organized.

Q. Since about the time of the organization in 1902?

A. Yes sir.

Q. Do they have different prices for the different machines, or the same price for all machines?

A. They claim to have the same price for all machines; I have had the McCormack and Milwaukee two years back and the price of those was the same.

Q. Cost you the same?

A. Yes sir, cost me the same.

Q. Now, you say you sold the Milwaukee machine for several years prior to 1902?

A. Yes sir.

Q. What did the machines cost you then,—binders and mowers?

A. A six foot Milwaukee binder cost us what we call a time price $87.50 and cash price $85.00; and a seven foot binder cost us $87.50 cash price or $92.50 time price.

Q. What did that machine cost you last year?

A. The six foot cost about—you mean the last year I had
96 the Milwaukee?

Q. 1910, last year?

A. Cost about $101.00 and about $103.00.

Q. What were the list prices last year?

A. They billed them out to me at $114.50 and $117.50, and the way I got my commission was to buy a carload lot of them; they would give me five per cent off, if I would take carload lot; they would give me $3.00 off if I set them up, and if I settled everything I owed them on September 1st in cash they give me an additional 5% off, and there was a 2% trade discount in it; we had to make our commission on discounts altogether.

Q. The machine that cost you prior to 1902 $85.00 cost you what last year?

A. About $101.00, I think.

Q. And the machine that cost you $92.50——

A. (Interposing.) No, that was the time price on it; $87.50 was the cash price,—would cost about $103.00. Those are not exactly the figures, of course, but they are approximately correct.

Q. Did you buy some machinery from these people last year?

A. Yes sir.

Q. Between the 2nd of March, 1910 and the 2nd of March, 1911?

A. Yes.

Q. What machinery did you buy?

A. All my spring goods came in, you know.

Q. I know. What does it consist of?

A. I think there was five or six McCormack binders,—I don't know which it was; I had six McCormack binders and seven
97 Milwaukees, but one of those was carried over from the year before; I think I bought twelve McCormack mowers and some Milwaukees, I don't recollect the number; maybe six or eight, I am not sure about that.

Q. You paid the International Harvester Company for these goods?

A. Yes sir.

Q. Delivered to you here in Todd County?

A. Yes sir.

Q. What did these mowers cost you?

A. They cost me net right around about $36.00, net.

Q. What size mower?

A. That is a 4½ foot cut; they had a vertic*le* lift mower, the McCormack people did, $1.00 added to that.

Q. That 4½ foot mower that cost you $36.00, what did that mower cost you prior to 1902?

A. I think we used to buy that mower at $32.00, is my recollection about that.

Q. Mr. Miller, do you have the contract that you had with the International Harvester Company last year, 1910?

A. Have I got it?

Q. First, did you have a written contract with them?

A. Oh, yes sir.

Q. Do you have that contract in your possession?
A. I don't know whether I have or not.
Q. You don't know whether you have or not?
A. No, sir.
Q. You know whether you have it in your pocket or not?
A. No, I haven't got it in my pocket.
98 Q. Do you know whether you have it in your place of business?
A. No; I looked for it a little and couldn't find it; it might be that I might be able to find it.
Q. Did you have a contract with them in 1909?
A. Yes sir.
Q. This contract was in the name of the Todd County Hardware Company?
A. Yes.
Q. What position do you have in connection with that Company?
A. I am secretary-treasurer.
Q. You say you had a similar contract for the year 1909?
A. Yes sir.
Q. I will ask you to state to the jury whether or not this is the contract you had with them for the year 1909?

Defendant objects.

By the COURT: Well, that is the contract itself, as I understand.

By the WITNESS: This is the 1909 contract made with the International Harvester Company, and the 1910 is the exact dates, price and everything, exactly.

By COUNSEL FOR DEFENDANT: That is a conclusion of the witness.

By COUNSEL FOR PLAINTIFF: That is a statement of fact.

By the COURT: Of course, you can have him go and look further for that contract if you want to, because he hasn't shown the loss of it.

By the WITNESS: We had a contract with Mr. Walker and myself settled this spring and I turned the repairs over to them with my repair book and he might have possibly got the contract.

99 Thereupon the witness retired to his place of business to search for said contract.

By the WITNESS (on his return): I couldn't find the contract; these are invoices; I found the 1909 invoices too.

Q. Mr. Miller, since you have made further research have you or not been able to find the contract between the Todd County Hardware Company and the International Harvester Company for the year 1910?
A. No, I cannot find it.
Q. Do you have in your possession the contract that was made between those corporations for the year 1909?
A. This is it. (Indicating.)
Q. I will ask you whether or not the contracts of the two years, 1909 and 1910 were identical in the printed matter and in the cost price of the goods purchased?

Objected to by defendant; objection overruled, to which defendant excepts.

A. Yes sir, identically the same, exact copy; the invoices shows that; you have got those there.

By Mr. MALLORY: We desire, please the Court, to introduce the contract for year 1909 and make it a part of the record.

By the COURT: It may be admitted.

To which ruling of the Court the defendant objected and excepted.

Said contract so introduced appears on the following page.

(Here follows fac-simile contract marked pages 99½, 100, and 101.)

FORM C 741 (Interstate.) 10M-7-30-08. 3 6 C 5

X

Mar - 16 1909

6

ORDER FOR 9849 10.1 14

Milwaukee GOODS

INTERNATIONAL HARVESTER COMPANY OF AMERICA

(INCORPORATED)

WITH

Todd Co. Hdw. Co.

P. O. Elkton

Business Point Same

County of Todd

State of Ky.

Shipping Point Same

Railway Co. L. & N.

Express Point Same

Express Co. Adams

(INTERSTATE)

Contract and Order for Milwaukee Goods

Mar - 16 1909.

INTERNATIONAL HARVESTER COMPANY OF AMERICA
(INCORPORATED)

Louisville, Ky.

Please ship

to Todd Bros. Hdw. Co.

at Elkton, Ky.

the goods hereinafter specified in number, and at prices hereinafter stated, which I (we) agree to pay for in cash, on or before the dates hereinafter specified, and if not then paid, hereby agree to pay interest thereon at the rate of 6 per cent per annum. We also agree to sell in the following territory:

Elkton & Vicinity

It is hereby agreed by and between the parties to this contract of sale, that the goods herein specified will be delivered between the dates specified (unless delivery is prevented by act of God or by the law, or by the decree or judgment of any court, or by the demand exceeding the supply, or by strikes, or by destruction, or serious injury to the shops where built).

The within named goods (except farm wagons, gears and truck wagons which are warranted only as hereinafter specified) are warranted to be made of good material, and to do good work when properly set up and adjusted. If any parts prove defective, the seller will have the right to replace them, and no goods are to be condemned on account of such defect if properly made good.

Purchaser agrees to examine all goods on arrival, and notify the seller of any shortage or defective parts, and give reasonable time to replace them, or the seller is not to be held responsible for any shortage or defects.

PRICES OF GOODS NOT HEREIN ORDERED ARE SUBJECT TO CHANGE.

IT IS FURTHER AGREED By and between the parties hereto that, in the absence of a written notice of change of prices, any additional goods furnished by the seller to the purchaser during the season, shall be furnished and paid for upon the terms and at the prices herein named.

IT IS FURTHER AGREED By and between the parties hereto that all Repairs and Extras ordered and furnished (except wagon and special repair parts which are net cash) shall be received and paid for on the terms herein specified, at list prices, less a discount of 30 per cent from said list prices.

IT IS ALSO HEREBY AGREED By and between the parties hereto that this order is subject to the approval of said COMPANY, at Chicago, Ill., or its general agent, and that there shall not be any change or modification of the terms or prices herein specified, unless such change or modification is in writing and is approved by said Company or its said general agent.

Purchaser's Signature Todd County Hardware Co; Incorporated

[SEAL]

By H. C. Miller Secy & Treas.

G. T. Walker

Salesman.

APPROVED

AT Tomaville, Ky Mar 22/1909 190....

(Fill in Town and State) GENERAL AGENCY STATE.

INTERNATIONAL HARVESTER COMPANY OF AMERICA.

By F. M. Fisher General Agent.

CREAM HARVESTERS

Number Ordered	TYPE.....	Net Price Each	
.....	No. 1. 300 lbs. per hour capacity	$.....	.....
.....	No. 2. 400 lbs. " " "	$.....	.....
.....	No. 3. 550 lbs. " " "	$.....	.....
.....	No. 4. 750 lbs. " " "	$.....	.....
.....	.....	$.....	.....
.....	.....	$.....	.....

TERMS ON CREAM HARVESTERS

NET CASH, ...days from date of invoice.

Less .... per cent if paid in.....days from date of invoice.

Above prices F. O. B.....

Ship..... between

.....1st, 190.... and .....1st, 190....

Number Ordered	GAS OR GASOLINE ENGINES, COMPLETE	Net Price Each	
.....	1 H. P. Air Cooled Gasoline	$.....	.....
.....	3 " Vert. Stat. "	$.....	.....
.....	2 " Famous "	$.....	.....
.....	2 " " Pumping Gasoline	$.....	.....
.....	2 " " Spray'g (on pump)	$.....	.....
.....	3 " Vertical Stationary	$.....	.....
.....	3 " " Famous	$.....	.....

OR COPY

ENGINES

Number Ordered	GAS OR GASOLINE ENGINES, COMPLETE	Net Price Each
	4-H. P. Horizontal Stationary	$
	4 " " Famous	$
	4 " " Portable	$
	6 " " Stationary	$
	6 " " Famous	$
	6 " " Portable	$
	8 " " Stationary	$
	8 " " Famous	$
	8 " " Portable	$
	10 " " Stationary	$
	10 " " Portable	$
	12 " " Stationary	$
	12 " " Portable	$
	15 " " Stationary	$
	15 " " Portable	$
	20 " " Stationary	$
	20 " " Portable	$
	10 " Traction Engine	$
	12 " " "	$
	15 " " "	$
	20 " " "	$
		$
		$
		$
		$
		$
		$
	Heavy Pumping Jack	$
	Belted " "	$
	" W. Beam P. "	$
	Standard Pumping Jack	$
	H. P. Comb. Att. for Nat. Gas and Gasoline	$
	Brake Att. for H. P. Port. Engine	$
	Auto Sparker	$

TERMS ON ENGINES AND ATTACHMENTS

ENGINES: NET CASH, ...days from date of invoice.
Less .....per cent if paid in.....days from date of invoice.
ATT.: NET CASH, ...days; .....% off for cash in.....days.
Above prices F. O. B. .....
Ship.....between
.....1st, 190.... and .....1st, 190....

HAY PRESSES.

Number Ordered	PULL PLUNGER PRESS	Net Time Price Each	Net Cash Price Each
.....	One-Horse, 14x18, unmounted	$.....	$.....
.....	One Horse, 14x18, mounted ...	$.....	$.....
.....	Two-Horse, 14x18, mounted..	$.....	$.....
.....	Two-Horse, 16x18, mounted..	$.....	$.....
.....	Two-Horse, 17x22, mounted..	$.....	$.....
.....	.....	$.....	$.....
.....	.....	$.....	$.....
.....	.....	$.....	$.....
.....	.....	$.....	$.....
.....	.....	$.....	$.....
.....	.....	$.....	$.....
.....	.....	$.....	$.....
.....	.....	$.....	$.....
.....	Lifting Jack.....	$.....	$.....
.....	4-Wheel Transport for 1 Horse	$.....	$.....

TERMS ON HAY PRESSES

NET TIME PRICE.....from date of invoice.

NET CASH PRICE.....days from date of invoice.

Less.....per cent if paid in.....days from date of invoice.

Above prices F. O. B.....

Ship .....between

.....1st, 190.... and.....1st, 190....

MANURE SPREADERS

Number Ordered	SIZE	Net Price Each	
.....	No. 2, 35 to 40 bu.....	$.....	.....
.....	No. 3, 55 bu.....	$.....	.....
.....	No 4, 75 bu.....	$.....	.....
.....	.....	$.....	.....
.....	.....	$.....	.....
.....	.....	$.....	.....
.....	.....	$.....	.....
.....	.....	$.....	.....

TERMS ON MANURE SPREADERS.

NET CASH.....days from date of invoice.

Less.....per cent if paid in.....days from date of invoice.

Above prices F. O. B.....

Ship .....between

.....1st, 190.... and .....1st, 190....

Milwaukee ....HAY RAKES.

Number Ordered	DESCRIPTION	Net Price Each
6	8 20 H.D. Baker	$ 16 00
2	8 2a S.D. "	$ 18 20
		$
		$
		$
		$
		$
		$
		$
		$

....HAY TEDDERS, SWEEP RAKES, STACKERS, COVERS, GRINDERS AND ATT.

Number Ordered	DESCRIPTION	Net Price Each
		$
		$
		$
		$
		$
		$
		$
		$
		$
		$
		$
		$
		$
		$
		$
		$

TERMS ON TEDDERS, RAKES, STACKERS, COVERS, GRINDERS, ETC.

NET CASH, Sept. 1st, 190 9

Discount of 7 % for cash July 1st, 190 9 or on receipt of goods when shipped after July 1st, 190 9

Above prices F. O. B. In car lots F.O.B. Elkton Ky Less than car lots F.O.B. Louisville

Ship Rakes, Tedders, Stackers, Covers, Grinders and Attachments ~~between~~ May 1, 190 9

and ....1, 190....

"KEYNOTE" SHELLER AND POWER

No. Ordered	DESCRIPTION	Net Price Each
		$
		$
		$
		$

TERMS ON "KEYNOTE" SHELLER AND POWER

NET CASH, ...days from date of invoice.

Less ....per cent if paid in ....days from date of invoice.

Above prices F. O. B. ....

Ship ....between

....1st, 190.... and ....1st, 190....

KEYSTONE HAND SHELLERS

No. Ordered	DESCRIPTION	Net Price Each
		$
		$
		$
		$

TERMS ON KEYSTONE HAND SHELLERS

NET CASH, ...days from date of invoice

Less ....per cent if paid in ....days from date of invoice

Above prices F. O. B. ....

Ship ....between

....1st, 190.... and ....1st, 190....

HAY LOADERS AND SIDE DELIVERY RAKES

No. Ordered	DESCRIPTION	Net Price Each
		$
		$
		$
		$
		$

TERMS ON HAY LOADERS AND SIDE DELIVERY RAKES

NET CASH, ...days from date of invoice.

Less ....per cent if paid in ....days from date of invoice.

Above prices F. O. B. ....

Ship ....between

....1st, 190.... and ....1st, 190....

TERMS OF PAYMENT.....

DELIVERED F. O. B.....

NO WARRANTY GIVEN ON TRUCK WAGONS

Number Wanted	Style No.	Description: Wagon or Gear	Size of Cast Skein	Skein Cast Skein Steel Axle	Tongue Drop or Slip	HEIGHT WHEELS: 2' 10"x3' 2" Bent Rims	TIRE: Specify Width and Thickness	BOX: Depth 26" or 36"	BOX: Length 10' 6" only	BOX: Wide or Narrow Track	Spring Seat with Lazy Back	No. of Brake if any	Net Price Each	

SHIP BETWEEN.....1ST, 190 AND.....1ST, 19

ECONOMY TRUCK WAGONS

TERMS OF PAYMENT.....

DELIVERED F. O. B.....

SOLD SUBJECT TO OUR WARRANTY AS PRINTED IN OUR WEBER WAGON CATALOGUE NO. 58

Number Wanted	Style No.	Description: Wagon or Gear	Size Skein	Wide or Narrow Track Gear	Skein Cast Skein Steel Skein Steel Axle	Tongue Drop Slip or Ox	HEIGHT WHEELS ON 2-H. GEARS: Regular 3' 8" x 4' 4" Medium 3' 4" x 4' Low 3' 4" x 3' 8" Truck 3' x3' 8"	TIRE: Specify Width and Thickness	BOX: Regular or give Depth	BOX: Length	BOX: Wide or Narrow Track	Spring Seat with Lazy Back	No. of Brake if any	Net Price Each	

SHIP BETWEEN.....1ST, 190 AND.....1ST, 190

WEBER WAGONS.

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TERMS OF PAYMENT .....

DELIVERED F. O. B. .....

SOLD SUBJECT TO OUR WARRANTY AS PRINTED IN OUR COLUMBUS WAGON CATALOGUE NO. 5

Number Wanted	Style No.	Description: Wagon or Gear	Size Skein	Wide or Narrow Track Gear	Skein Cast Skein Steel Axle	Tongue Drop or Slip	HEIGHT WHEELS ON 2-H. GEARS Regular 3' 8"x4' 4" Medium 3' 4"x4' Low 3' 4"x3' 8" Truck 3' x3' 8"	TIRE Specify Width and Thickness	BOX: Regular or give Depth	BOX: LENGTH	BOX: Wide or Narrow Track	Spring Seat with Lazy Back	No. of Brake If any	Net Price Each	

SHIP BETWEEN ..... 1ST, 190 AND 1ST, 190

COLUMBUS WAGONS.

TERMS OF PAYMENT .....

DELIVERED F. O. B. .....

SOLD SUBJECT TO OUR WARRANTY AS PRINTED IN OUR BETTENDORF WAGON CATALOGUE NO. 1

Number Wanted	Style No.	Description: Wagon or Gear	Size of Axle	Wide or Narrow Track Gear	HEIGHT OF WHEELS ON 2-H. GEARS: FARM WAGON Regular 3' 8"x4'4" Medium 3' 4"x4' Low 3' 4"x3' 8"	HEIGHT OF WHEELS ON 2-H. GEARS: FARM TRUCK 30x32 S. W. 30x30 S. W. 32x44 W. W. 36x36 W. W.	TIRE Specify Width and Thickness	BOX: Regular or give Depth	BOX: Length	BOX: Wide or Narrow Track	Spring Seat with Lazy Back	No. of Brake If any	Net Price Each	

SHIP BETWEEN ..... 1ST, 190 AND 1ST, 19

BETTENDORF WAGONS

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STEEL KING WAGONS

TERMS OF PAYMENT ....

DELIVERED F. O. B. ....

SOLD SUBJECT TO OUR WARRANTY AS PRINTED IN OUR BETTENDORF WAGON CATALOGUE NO. 1

Number Wanted	Style No.	Description Wagon or Gear	Size Skein	Wide or Narrow Track Gear	Tongue Drop or Slip	Height of Wheels on 2-H Gears Farm Wagon Regular 3' 8"x4' 4" Medium 3' 4"x4' Low 3' 1"x3' 8"	TIRE Specify Width and Thickness	BOX Regular or give Depth	BOX Length	BOX Wide or Narrow Track	Spring Seat with Lazy Back	No. of Brake If any	Net Price Each

In consideration of the sale of the full car of ... money ... said machines ... quantity discount 5% will be allowed.
In consideration of the purchase of a full car load, or the ... of binders, mowers and shockers under this contract of sale, time of payment will be extended on binders, mowers and shockers actually on hand after September 1, 1908 until September 1, 1909 with interest at 6%.

SHIP BETWEEN .... 1st, 190...... AND .... 1st, 19......

Number Ordered	MISCELLANEOUS	Net Price Each	
2	5 & 6 ft. Grain Binders	$ 114	50
6	7 " " "	$ 117	50
	8 " " "	$ 138	00
	Corn "	$ 111	50
	" Shockers	$ 118	00
	3 1/2 ft. Reg. Mowers	$ 36	00
	3 1/2 " Vert. "	$ 37	00
	4 1/2 & 5 " Reg. "	$ 40	50
(Ma) 12	4 1/2 & 5 " Vert. "	$ 41	50
	5 ft. Big "	$ 43	00
	6 " " "	$ 44	00
	7 " " "	$ 45	00
	Regular Reaper	$ 59	50
	Stemp "	$ 70	00

All goods to be settled for in Cash or Notes on receipt of invoice.

If all grain or corn binders or shockers purchased under this contract of sale are delivered, set up and settled for without assistance or expense to International Harvester Company of America, a reduction from the within prices will be made at time of final settlement of \$3.00 on each machine.

If all machines and attachments purchased under this contract of sale are paid for in cash September 1, 1908, an additional discount of 2% will be allowed, provided said purchaser shall have then fully discharged every other of his matured obligations and debts to said Company.

Prices herein named on 6 and 7 ft. Grain Binders include bundle carriers and transport trucks. 8 ft. Grain Binders, transport and tongue trucks. Corn Harvesters are equipped with bundle carriers. When transport trucks are not furnished with Grain Binders a reduction of \$3.00 will be made.

Freight will be refunded at time of settlement on car lots of binders, mowers and shockers ordered and shipped direct from factory.

TERMS ON Binders Mowers & Shockers

NET CASH, Sept. 1 - 09 ~~days from date of invoice~~

Less 5 per cent. if paid ~~X~~ 9-1-09 ~~days from date of invoice~~

Above prices F. O. B. ....

Ship Binders & Mowers ~~between~~

May 1st, 190 9 and .... 1st, 190....

PAGE BOUND VERTICAL IN BOOK

Form B 3. 300M sets--1-15-10.

INTERNATI

INVOICE --

ORDERED 4-14,1910. Shipped by

Goods described below are
Prices are extended on thi
must be settled for acc

SHIPPED TO Todd County Hdw. Co.

AT Elkton, Ky.

VIA

NO CLAIM FOR SHORT

In referring to
Plea

Billed from Chgo. Ano. 61 21
Twine

Quantity	Size	Desc
3	7	Ft. L. H.
3		Transpo
5	4½	Ft. New
5	4½	" Vert.
7000	#	Mc "
3000	#	"

Advance Freight our Goods $
" " other " $
Total Advance Charges collected from R.
Advance Charges Debited your Acc't. $
Freight Prepaid and " " " $

292

0.

INTERNATIONAL HARVESTER COMPANY OF AMERICA
(Incorporated)
INVOICE --Machines, Attachments, Twine and sundries.

McCormick
factory output
NO. 941.

pped by I.H.Co. At Chicago. Block

ed below are this day shipped you as per terms and conditions of contracts between us.
tended on this invoice for convenience of accounting. Commission goods when sold
settled according to the terms and prices specified in the Agency Contract.

Co.

ACCOUNT OF

AT BLOCK

GENERAL AGENCY Louisville.Ky. 4-14-1910.

AIM FOR SHORTAGE ALLOWED UNLESS MADE IMMEDIATELY ON RECEIPT OF GOODS

referring to this shipment always give INVOICE NUMBER.
Please report any extraordinary delay in arrival.

Description	Discount Rate	Discount Date	Net Due Date	Price	Machines Amount	Twine Amount	Sundries Amount
Ft. L. H. Binders				117.50	352.50		
Transports							
Ft. New 4 Mowers				40.50	202.50		
" Vert. "				41.50	207.50		
Mc " Sisal	Paid	5/6 -	1910	7-3/8		516.25	
" Standard	Paid	5/6 -	1910	7-3/8		221.25	

ected from R.R.Co. $
r Acc't. $
" $

Shipped 4 - 12- 1910.
Via Car No. and Initial 36586
By Chicago

Total machines/ 762.50
" Twine 737.50
" Sundries
Total Charge 1500.00

Form B 3 300M Sets--1-15-10.

INTERNATIONAL HARVESTER COMPANY OF AMERICA
(Incorporated)
INVOICE--Machines, Attachments, Twine and sundries.

ORDERED,- 4-14- 1910. Shipped By I.H.Co. At Chicago

Goods described below are this day shipped you as per terms and conditio
Prices are extended on this invoice for convenience of Accounting. Commi
sold must be settled for according to the terms and prices specifie

SHIPPED TO Todd County Hdw.Co. Account OF

At Elkton, Ky. AT

Via General Agency Louisville, Ky.

NO CLAIM FOR SHORTAGE ALLOWED UNLESS MADE IMMEDIATELY

In referring to this shipment always give INVOICE
Please report any extraordinary delay in arri

101

Quantity	Size	Description	Discount Rate	Discount Date	Net Due Date	Price	Am
4	6	Ft. # 10 Binders				114.50	4
4	7	" " "				117.50	4
8		Transports					
5	4½	Ft. #5 Mowers				40.50	20
							11
		Billed from Chicago Invoice 8					

Advance Freight our Goods $
" " other " $
Total Advance Charges
Advance Charges collected from R.R.Co. $
Advance Charges Debited your Acct. $
Freight prepaid and" " " $

Shipped 4 -12 -1910/
Via Car No. and Initial 36586
By Chicago.

INTERNATIONAL HARVESTER COMPANY OF AMERICA
(Incorporated)
INVOICE--Machines, Attachments, Twine and sundries.

Milwaukee
(factory output)
No. 942.

Shipped By I.H.Co. At Chicago Block

Below are this day shipped you as per terms and conditions of contracts between us.
Entered on this invoice for convenience of Accounting. Commission goods when
sold are settled for according to the terms and prices specified in the Agency Contract.

Inv.Co. Account OF

AT BLOCK

General Agency Louisville,Ky. - 4-14- 1910.

NO CLAIM FOR SHORTAGE ALLOWED UNLESS MADE IMMEDIATELY ON RECEIPT OF GOODS.

In referring to this shipment always give INVOICE NUMBER.
Please report any extraordinary delay in arrival.

Description	Discount Rate	Discount Date	Net Due Date	Price	Machines Amount	Twine Amount	Sundries Amount
Ft. # 10 Binders				114.50	458.00		
" " "				117.50	470.00		
Transports							
Ft. #5 Mowers				40.50	202.50		
					1130.50		
Chicago Invoice 8							

Total Machines
" Twine
" Sundries

Total charge

Acct.$
" $

Shipped 4 -12 -1910/
Via Car No.and Initial 36586
By Chicago.

102 Q. Do you have in your possession the invoices of the goods purchased by the Todd County Hardware Company of the International Harvester Company of America for the year 1910?

A. I think that is a part of them (indicating); not all of them; there's more of them.

Q. Do you have those invoices pertaining to the shipment and stating the price of grain binders and mowers?

A. Let me see (witness examines invoices). Yes sir, this is them; that is 1910.

Q. You received the shipments stated in these invoices?

A. Yes sir.

By Mr. MALLORY: We desire to put these in evidence.

(Said invoices are attached hereto.)

Q. You paid for them?

A. Yes sir.

Q. What did the mowers cost you for 1910?

A. Plain mower cost $40.50, billed out at $40.50, and vertic*le* lift $41.50, with 2% and 5% off that.

Q. The discounts being the same on the mower and binder?

A. No, more on the binder than they were on the mowers; no, two, five and two, and $3.00 off the binder if we set the binder up.

Q. Mr. Miller, was there ever any reduction in the price or cost of these mowers and binders any year from 1902 on up as long as you handled them?

A. Not that I ever found.

103 Q. State whether or not the Company made a contract with you relative to setting up the machines; did they give you a discount if you set the machines up, or would they charge you more if they furnished an expert?

A. Charged $3.00 more if they had to send a man here to set it up; that is they would invoice the machines at $117.50 and if they sent a man to set it up we had that $3.00 to pay; if we done it they would take $3.00 discount off the face of it.

Q. Saved you the $3.00?

A. Saved the $3.00.

Q. What machines did you handle for the International Harvester Company, or of its goods in 1910?

A. Handled the McCormack and Milwaukee; binders and mowers both.

Q. Did you have a contract with this Company, or handle any of those goods this year?

A. No, sir.

Q. Why didn't you handle some of the goods this year?

Objected to and objection sustained.

Q. While you were the agent for this Company handling its goods from 1902 on up to this year, what was the rule of the Company, if any, relative to fixing the selling price, retail price?

A. Well, a few years after they organized and got together they returned with the contract the retail prices and say to the agent

you must hold to the price we have fixed on it. A few days ago though they quit sending that out and they didn't say—they acted after that; if a man didn't hold to the retail price what they wanted to hold to he quit handling their machines.

Q. I believe you stated that the rule of the Company in selling machines was to sell one machine to one man at a place?

104 A. Yes. I mean this, Mr. Mallory, that if they had no other agent here, they would let me have two machines; for instance, the Milwaukee and McCormack; and if they had another agent here they had say the McCormack machine, of course, they wouldn't ship me even a repair for a McCormack machine.

Q. Wouldn't let you handle that machine at all?

A. No.

Q. What was their rule about that, did they give a man a town or County, or what territory?

A. Sometimes they had two men in the same town with different machines, but they never give me no County.

Q. Gave you the town?

A. And vicinity; Elkton and vicinity.

Q. Now, Mr. Miller, under your testimony, prior to 1902 a five and six foot binder cost you in Elkton $85.00 and $87.50——

A. (Interposing.) That would be in carload lots.

Q. You say that in 1910 this same machine cost you something over $100.00, $101.00 and $103.00?

A. A out that.

Q. I will ask you to state to the jury whether or not the real value of those machines that were delivered to you in 1910 were worth as much as $101.00 and $103.00?

Objected to by defendant; objection overruled, to which defendant excepts.

A. All I can give as a value——

Q. Just answer the question?

A. Well, I wouldn't know how to make that value without

105 taking a basis on it. If I go back and base the price on those machines before 1902 and take from it what should have been reduced when the International organized, as to the way they put it to me,—why it would reduce the machines considerably below the price at that time.

Defendant objects and excepts.

Q. Then was the price at which these machines were sold to you in 1910 or not more than it was reasonably worth in proportion to the price charged heretofore?

A. I think it is.

Defendant objects and excepts.

By the WITNESS: I have got it figured out the difference in material it takes to make a binder and mower in 1904 and 1905,—the actual material that goes in it.

Q. And you think that the cost of it to you as sold to you by the

International Harvester Company of America was more than it was really worth?

A. That was my idea about that.

Q. Do you have that idea yet?

A. Yes sir.

Q. Mr. Miller, was there in 1910 any reason for an excessive cost in the machinery by reason of any disturbance of the commercial world, such as wars, anything of that kind, you know of?

Objected to by defendant; objection overruled; defendant excepts.

Q. Market conditions normal?

A. Yes sir, material was a little off to what it had been a year or two before that.

Q. What are the constituent elements of these machines, mowers and binders?

106 A. Well, let's see—they are made of malleable and gray irons, steel, wood, leathers, canvas, cotton canvas, paint—put a coat of paint on them.

Q. Do you say the cost of these articles was more or less in 1910 than in previous years?

A. Less than it was in 1908, take it on an average; good deal of slump in timber.

Q. And some falling off in the cost price of all these things you have named?

A. Yes sir, take the list and follow it through, it's really cheaper now than it has been since 1902.

Q. What, Mr. Miller, is the comparative weight of a binder now and the binders of the same dimensions made eight or ten years ago, are they heavier or lighter now?

A. I would say they are a little bit lighter now in weight; trying to build every year lighter.

Q. Less material in them now than formerly?

A. Well, I suppose there is; well, I know there is a little less material in weight; not enough to amount to anything though.

Q. And that is true of mowers as well as binders is it not?

A. Oh, yes sir, I think so.

Q. You spoke of the increase in these raw materials, iron, woods & etc. in the last ten years, I will get you to state to the jury if the increase in these raw materials is enough to justify the increase in the manufactured product,—binders and mowers?

Objected to by defendant.

By the COURT: He may ask him to compare them and give his opinion about it.

To which ruling of the Court defendant excepts.

107 By the WITNESS: Well, I have the price in 1904 and 1908, and it is a difference of $1.44 in the material that goes in binders; I got this by figuring the material out; this much difference in the material, $1.44, I think is the figures.

Q. In the raw material?

A. Raw material; of course, I have no idea what the difference in labor would be.

Q. I will get you to state whether or not this increase would be sufficient to justify the increase that was made to you in the cost of this machinery?

Objected to by defendant.

By the COURT. That is a question for the jury; you may state the extent of this. Let the jury draw their own inference.

To which ruling the plaintiff excepts.

Q. What is the proportionate cost of the raw material that goes into a binder to the cost of the finished product that is delivered to the retail merchant?

A. I can't say that. Depends a great deal on the kind of product; for instance, a man could finish a plow with a less per cent on the raw material than he could some other machinery.

Q. That has reference to binders and mowers because we are confined to that?

A. I couldn't say as to that.

Cross-examined by Mr. BROWDER for Defendant:

Q. Mr. Miller, what kind of lumber went into the construction of mowers and binders, did you say?

108 A. Well, simply hardwood, what they call pole stock, something like that.

Q. What was hardwood or pole stock worth in 1902, the kind that goes into these machines?

A. What was it worth?

Q. 1902, yes?

A. 1902 it was—I don't know what it was; I know in 1904.

Q. What was it worth in 1908?

A. $36.00.

Q. What is the difference in the cost in 1902 and 1908, either one way or the other?

A. I don't know about 1902; I know about 1904, $28.50.

Q. Wasn't the cost 23½% more in 1908 than 1902.

A. I can't say.

Q. Did you handle any of it yourself?

A. I have been handling a little lumber all along.

Q. Handle any in 1903 and 1904?

A. I used barn stock.

Q. You know anything about what that was worth in 1902?

A. Nothing except the market.

Q. What was the market in 1902, '3 or '4?

A. Finished or raw?

Q. Raw material?

A. Worth about $25.50 somewhere right in there.

Q. What was it worth in 1908?

A. $36.00.

Q. Increased that much?

A. Yes.

Q. What was hardwood lumber worth in 1902?
109 A. About the same proportion.
Q. Didn't that increase from 1902 to 1908 42%?
A. I know the market generally; I never figured that out; the basis of it is about the same.
Q. Have you got any figures with you?
A. None except the market.
Q. Where are your market figures, have you got them with you?
A. No, sir.
Q. When did you last look at the market for 1902?
A. I have been following it all along.
Q. What was the market for hardwood lumber in 1902?
A. They used pine.
Q. What was that worth in 1902?
A. About the same pole stock was.
Q. What?
A. $25.50, along about that; vary a little from one year to another.
Q. Do you mean to say they used altogether pine wood in these machines?
A. Most every bit.
Q. Any hardwood in it?
A. Very little.
Q. Single trees and double trees, what are they made out of?
A. I think pine.
Q. What else?
A. Sometimes white oak.
Q. What was oak worth in 1902, raw material?
A. I don't know what it was worth at Chicago.
Q. You testified to it, didn't you?
110 A. No, I didn't; I said the market.
Q. Well, what was it worth in the market?
A. The market on that kind of stock was about $25 a thousand.
Q. What was it in 1908?
A. I sold some in 1908 at $32.00.
Q. That went up also, didn't it?
A. Yes, sir; 1909 and '10 come down.
Q. How much did it come down, lumber in this country in 1910?
A. Six and eight dollars a thousand.
Q. Here?
A. Right here in Elkton.
Q. Do you know what the International Harvester Company had to pay for it?

Objected to by plaintiff.

By the COURT: If he knows.

A. I expect it cost them the market price.
Q. And you tell the jury that lumber went down in 1909 and '10?
A. 1909 and '10.
Q. Mr. Miller, do you know anything about the cost of this can-

vas or duck that goes into these machines in 1902, 1904, 1908, whether it went up or down?

A. In 1902 that kind of goods was pretty low.

Q. Did it go up or down in 1908?

A. I suppose it went up about 30%.

Q. Do you know what kind of steel it is that goes into these machines?

A. Common steel.

111 Q. What was that worth in 1902?

A. Worth about $1.70, somewhere along there.

Q. What was it worth in 1908?

A. $1.78.

Q. That went up also?

A. Yes.

Q. Didn't it go up 32% between 1902 and 1908 on the open market?

A. I don't know; I don't think it went up that much.

Q. How much per cent did it go up according to your figures?

A. I didn't figure it.

Q. How much did it go up?

A. It was $1.65 in 1902 and advanced to $1.78 in 1908.

Q. Went up thirteen cents?

A. On the hundred pounds.

Q. Are you accurate in that figure, or is — your recollection?

A. I think I am accurate.

Q. Have you got anything as a guide?

A. I took the Iron Age and went back to see.

Q. Have you got that with you?

A. No, it's over at the store.

Q. When did you get those figures as to 1902?

A. That was two or three months ago,—the Iron Age compared those figures, compared them up to date.

Q. When did you begin this investigation?

A. I said I investigated and made the figures.

Q. When?

A. Oh, when did I do that; I said I did that as to 1904 and 1908.

Q. When did you do that?

A. On yesterday.

Q. Where did you get your figures about the market those

112 differ- years? Get them in the market?

A. No, I figured them on the basis of Mr. Edgar's deposition, I believe is his name.

Q. I am asking you where you got your information?

A. That is where I got the figures, what Mr. Edgar said.

Q. In this case?

A. Yes.

Q. You took his figures?

A. Yes sir.

Q. That is where you got your idea?

A. Yes sir.

Q. And you did that when? yesterday?

A. Yes.
Q. Getting ready to testify today?
A. Yes sir.
Q. There is some pig iron that also goes into these machines, on't it, Mr. Miller?
A. I expect it does.
Q. Has pig iron increased since 1902 or gone down in price?
A. Little higher than it was in 1902.
Q. How much?
A. I don't know.
Q. Isn't it 23% higher?
A. I couldn't say.
Q. Could you give the jury your idea how much higher?
A. No, I never made any figures to see how much higher each grade of iron was.
Q. You know what grade of iron goes into these machines?
A. Gray iron and malleable iron.
Q. Malleable iron, take that, did that go up or down, since 1902?
A. Little higher than 1902.
Q. And you think cotton duck went up, advanced?
A. Yes sir.
Q. Advanced?
A. Yes.
Q. About 40%?
A. I don't know the per cent; I know it went up.
Q. Some leather straps or aprons on these binders, ain't there; did ather go up or down since 1902?
A. In 1902 we were paying about 31¢ for plain leather that we e paying 40¢ for now.
Q. It has gone up in that proportion?
A. Nine cents on the pound.
Q. Do you know of anything else in these machines we haven't entioned.
A. Steel in them.
Q. We mentioned steel awhile ago, didn't we,—in our talk here?
A. Yes, paint.
Q. Did paint go up since 1902?
A. In 1909 paint got up mighty high; up to that time been about e same.
Q. Anything else except duck, steel, iron, paint and leather and ood?
A. Labor in it.
Q. I am talking about the raw material?
A. No; different kinds of steel in it, sections and guards and rivets and boxings are different stuff to the other stuff.
Q. Made of wood, or iron or steel?
A. Made of steel.
Q. You said all those things had gone up since 1902?
A. Except paint; sections and rivets and guards *are* cheaper in 08 than they were in 1902.
Q. How much cheaper?

A. About 25%.
Q. What were they worth in 1902?
A. Sell for about 7½¢ apiece; now they cost 2¾¢.
Q. That the complete thing you are talking about?
A. Sections of the blade.
Q. What was in the raw material in 1902?
A. I don't know.
Q. You know anything on these machines that didn't go up in 1902?
A. No, I can't say that I did.
Q. How do you figure your machines went down in value?
A. I didn't figure that.
Q. Didn't figure that?
A. I said the advance was more in proportion to the advance of material than I thought just.
Q. Can you give the jury what the average advance in all this raw material has been since 1902?
A. I expect an average of five or six per cent.
Q. Do you know of any item that didn't increase 25%?
A. I couldn't say about that.
115 Q. Didn't leather go up 80%,—since 1902?
A. The leather I bought didn't.
Q. Mr. Miller, do you know anything about the labor required to manufacture these machines?
A. Whether it has increased or decreased?
Q. Yes?
A. I expect it has increased.
Q. How much?
A. I have no idea.
Q. Do you know anything about warehouse charges, or taxes, cost of insurance?
A. No.
Q. Is there any way for you to figure to this jury the cost of building these machines accurately?
A. Accurately?
Q. Yes sir?
A. No.
Q. What machine do you handle now?
A. I handle the Wood.
Q. Walter A. Wood?
A. Yes sir.
Q. Is that a competitor of the International Harvester Company?

Objected to by plaintiff; objection overruled; pl'ff excepts.

A. I don't know whether they claim to be a competitor.
Q. How long have you handled the Walter A. Wood?
A. Since last year.
Q. What did you sell the Walter A. Wood binder for?

Objected to by plaintiff.

116 By the COURT: Not what he sells them for at present at all.

Q. How long have you represented the Walter A. Wood Company?

Objected to by plaintiff; objection overruled; pl'ff excepts.

A. Since last year; I had the mowers year before last.
Q. You had the mowers in 1910?
A. Yes.
Q. And you took the binder in 1911?
A. Yes.
Q. Begin in January, when did you begin?
A. I made a contract in February, maybe, 1910, handled them in 1910.
Q. Which, the mower and binder both?
A. Both in 1910; 1909 I had the mowers.
Q. But since 1910 you have had them both?
A. Yes sir.
Q. They were in business here in Elkton then in the year 1909?
A. I had the mowers here.

Redirect examination by Mr. MALLORY:

Q. You say you sold the Walter A. Wood in 1909?
A. In 1909, I sold some of them.
Q. And you sold some of the Walter A. Wood mowers in 1910?
A. Yes sir.
Q. And in 1911, the International Harvester Company wouldn't let you sell their goods?

Objected to by defendant.

A. 1910?—I didn't sell the International last year; this is 1911.
Q. It is this year you didn't sell their goods?
A. This year I didn't sell them.

117 Q. You spoke awhile ago about the repairs for this machine, what about the cost of repairs for machines now,—1910, as compared with 1902?

Objected to on the ground that the same is in chief.

A. What we call net extras, which includes chains, sections, guards, knife heads, pitmans, everything of that sort is 25 to 30% cheaper than it was in 1902; if there has been any change in the malleable and castings, I don't know,—very little; may be some pieces changed in this, but very little.

Q. I will get you to state whether or not there is competition in these things,—whether or not companies other than the International Harvester Co. make them and sell them?
A. Oh, yes sir, three or four or five make them.
Q. Can you name some of them?
A. Whitman-Barnes makes them; there is two other concerns that makes them,—peculiar names, net extras for all machines, everything made.
Q. Can be used for all machines?
A. Yes.

Q. And those net extras as you call them are cheaper now by 25 or 30% than they were in 1902?
A. Yes sir.
Q. These net extras, the prices about the same now as in 1910, last year?
A. Cost the same this year as did last year.

Recross-examined by Mr. BROWDER:

Q. Mr. Miller, did I understand you to state to Mr. Mallory, on original examination that general market conditions were the same in the year 1902 as 1908?

By Mr. MALLORY: No, I didn't ask him that question.

118 A. No, he asked me, I think, if there was—something about it but in a different form.

By Mr. MALLORY: I asked him about 1910.

Q. Haven't we had an era of high prices in everything for the last ten years, unprecedented?
A. I couldn't say.
Q. Don't it cost a fellow more to live then he can make in town, ain't that a fact?

Objected to and objection sustained.

Thereupon the Commonwealth announced through.

Thereupon came defendant by its attorneys and moved the court for an instruction directing the jury to find for the defendant, to which the Commonwealth objection, and the same being argued and considered by the court, the motion was overruled, to which ruling of the court the defendant objected and excepted.

By Mr. S. W. FORGY, Attorney for defendant: Gentlemen, this is the deposition of William B. Edgar read by agreement. (See Bill of Exceptions.)

The next witness, W. J. GARROD, called in behalf of defendant, testified as follows:

Direct examination by A. M. RUTLEDGE:

Q. Your name is W. J. Garrod?
A. Yes sir.
119 Q. Where do you live, Mr. Garrod?
A. Chicago.
Q. What business are you engaged in there?
A. I am with the International Harvester Company.
Q. In what capacity are you engaged with the International Harvester Company?
A. Assistant Chief Store Keeper.
Q. How long have you been Assistant Chief Store Keeper?
A. Since last December.
Q. What are the duties of the Assistant Chief Store Keeper?

A. He has general supervision over all the material- consumed at the plant that go into the production of the machines.

Q. Have you a store house for the various materials that are used in these machines?

A. Yes sir.

Q. What kind of material do you have in the store house over which you have supervision?

A. Steel, pig iron, paints, lumber, fuel oil.

Q. Are you familiar with the prices of these various materials from the year 1902 up to the present time?

A. Yes sir.

Q. You have been Assistant Chief Store Keeper since last December. How long have you been connected with the International Harvester Company?

A. The International Harvester Company,—approximately three years. I have been in the harvester business all told about fifteen years.

Q. I wish you would name the material- that go into the construction of these machines and which you keep in store at your
120 storehouse in Chicago?

A. Steel, pig iron, paints and oils, all kinds of fuel, cotton duck; that practically covers the larger lines.

Q. Lumber have any part in it?

A. Yes sir, I didn't mean to omit lumber.

Q. Now, since 1902, up to the present time, has there been any increase in the price of these materials which are used in the construction of the various harvesting machines sold in Kentucky and in this County?

A. Yes sir.

Q. What has been the increase in these various articles, you may state them, Mr. Garrod, from 1902 up to and including the 2nd day of March, 1911?

A. The increase in steel has been approximately 30%; pig iron approximately 20%; fuel oils about 15%; fuel about 10%; cotton duck about 40%, and leather straps from 60% to 80%.

Q. What about lumber?

A. I cannot speak so definitely on lumber; but I should say off hand about 35%.

Q. That 35% is on the lumber which was used in the construction of these various farming machines?

A. Yes sir.

Q. You spoke about fuel, what sort of fuel, Mr. Garrod, do you use?

A. We use a great deal of fuel oil and coal and coke.

Q. And what advance has there been in that within the time specified?

A. About 15%.

Q. How many grades of steel are used in the construction of these various machines?

121 A. Upwards of forty to fifty kinds.

Q. Is there any difference in the advance of the price of these different grades of steel?

A. Yes sir.

Q. Some advanced more than others?

A. Yes sir.

Q. And what would you state was the average advance of steel used in the construction of these machines from 1902?

A. About 30%.

Q. Do you know anything about the labor that is used in the construction of the various machines, mowers, binders and hay rakes and as to whether there has been an increase or decrease in the cost of that labor since 1902?

A. I know there has been an increase in it, but it is not a part of my duty to know specifically what it is.

Q. You have no connection with that department?

A. Not directly.

Q. You say you know there has been an increase?

A. Yes sir, I do.

Q. Could you approximate what that increase has been since 1902?

A. I should say from 20 to 25%; from 20 to 25%.

Q. You are speaking in a general way without any specific knowledge on that particular point?

A. Yes sir.

Cross-examination by Mr. MALLORY.

Q. You say you live in Chicago, Mr. Garrod?

A. Yes sir.

Q. How did you happen to be in Elkton to-day?

122 A. It was my advice to come here by the counsel, Mr. McMath, of the International Harvester Company, because I am acquainted with these facts.

Q. Mr. McMath is an attorney for the International Harvester Company of America?

A. Yes sir.

Q. The Company by which you are employed?

A. Yes sir.

Q. You are employed by the International Harvester Company?

A. Yes sir.

Q. Same, except you leave off "of America"; same name, except you leave off these words?

A. Yes.

Q. You have been in the employ of these companies since last December, did you say?

A. Yes sir; and prior to that I was too; I was out of their employ about four years.

Q. Recently you have just been in their employ since last December?

A. Yes sir.

Q. You have been talking about the increase in the price of steel, per cent. of increase in steel and iron and lead and leather and so on, what year was the highest point of that increase?

A. 1907.

Q. Gradually gotten cheaper since 1907?

A. Some grades have.
Q. Principal part of the grades have, haven't they?
A. No.
123 Q. What grades have not?
A. The crucible steel, the higher priced steels have not declined in price worthy of mention.
Q. What about Bessimer steel?
A. Bessimer steel has had fluctuations.
Q. Has it gone down since 1907, decreased in price?
A. Yes sir.
Q. Increased from 1902 up to 1907 and has since then decreased?
A. Yes sir, it has had fluctuations up and down since 1907.
Q. Yes, there has been some fluctuations before from 1902 to 1907, wasn't there?
A. Yes.
Q. Isn't that same thing true of lumber?
A. I can't say specifically, but I think not.
Q. You think the lumber,—I am speaking of all the products that go into the manufacture of the International Harvester Co. machines,—you think the lumber used in these is higher now than ever?
A. Taken as an average price, it is yes sir.
Q. What kind of lumber is used in the manufacture of binders and mowers?
A. Hickory, oak——
Q. How much hickory——

By Mr. Browder: Wait until he gets through.

Q. Do you want to say any other kinds?
A. I was going to say some other kinds—hickory, oak, ash, long leaf yellow pine, some beech wood, some maple and some cheaper crating lumber.
Q. That all?
124 A. Those are the principal ones.
Q. Now, which ones of these is used in the McCormack binder?
A. Some of each of them.
Q. What is the hickory used for?
A. Double trees.
Q. What is oak used for?
A. Double trees or single trees.
Q. Don't use the same for the same thing, do you?
A. Yes sir.
Q. Do you furnish two double trees with a binder?
A. Sometimes.
Q. Furnish two double trees with it?
A. Yes sir.
Q. Now what else is used in a McCormack binder?
A. What other lumber you mean?
Q. Yes, what kind?
A. Long leaf yellow pine.

Q. What's that used for?
A. Tongue.
Q. What else?
A. Oh, yes sir, cleats that go into the construction of the decks.
Q. I say what other lumber is used in the construction?
A. Beech wood and——
Q. What's that used for?
A. Divider.
Q. What other kind do you use?
A. Ash.

Q. What do you use that for?

125 A. Some use it for reel arms; occasionally for single trees and occasionally for cleats, substitute for pine.

Q. If I understand you, you use some kind of timber in making the machine at one time and another kind at another time?
A. That is correct.
Q. You don't make all alike and do not use the same material?
A. Make them practically all alike, but do not use the same material.
Q. Sell them all at the same price?
A. I don't know anything about that.
Q. And all this timber you have named here has gradually increased from 1902 on up to the present time in price?
A. I say the average price of lumber has increased.
Q. All the way through these years?
A. Yes sir.
Q. Can you tell us how much hickory and oak has increased?
A. No, I cannot.
Q. What was hickory worth in 1902?
A. That depends upon the kind.
Q. You name the kind and fix the price?
A. I cannot state specifically; I should say o ffhand one inch hickory was worth $24.00 or $25.00.
Q. What was oak in 1902?
A. Oak ranged in price very close to hickory.
Q. What was it worth in 1910?
A. Possibly $30.00.
Q. $30.00 a what?
A. Thousand.

126 Redirect examination by Mr. RUTLEDGE:

Q. I understood you to say, Mr. Garrod that sometimes double trees are made out of oak and sometimes out of hickory?
A. Yes.
Q. Did you mean to say that they furnished two sets of double trees with a machine or simply used the different woods at different times?
A. Both; you might construe that answer either way; some machines are shipped with two double trees and some with one; in either case maybe used either.

Q. Used both woods in making double trees?
A. Yes sir.
Q. You spoke about some material that reached its highest point in 1907, that I believe was Bessimer steel; am I correct in that?
A. Yes sir; I am not positive whether that year was 1907 or 1908, one or the other.
Q. That was the top point in price. Then you further stated that there had been some reduction from that time until now?
A. Yes sir.
Q. Has that reduction brought the price back to what it was in 1902, or is it still higher than it was in 1902?
A. The present market is lower than it was in 1902. As a matter of fact there is no real market on steel to-day; you can buy it at quite a range of prices; as we express it, the market is "shot to pieces."
Q. Take it up from March, 1911, back to say 1903, what is the comparative price, is the price now higher than it was in 1902 or lower?
127 A. The average price of steel would be higher in March, 1911, than it was in March, 1902.

Recross-examined by Mr. MALLORY:

Q. Hadn't you just stated in the question before that, that it was lower?
A. The price of steel bars was lower, but not the average price of steel we consume.
Q. As a matter of fact isn't Bessimer steel cheaper now than it was in 1902?

Objected to.

Q. As a matter of fact, wasn't it lower in 1910 than it was in 1902?
A. No.
Q. What was the difference in price in 1902 and 1910?
A. About one dollar a ton.
Q. What did it cost in 1902?
A. About $1.30.
Q. What did it cost in 1910?
A. About $1.35.
Q. What about pig iron?
A. What do you mean?
Q. Was it higher in 1910 or lower in 1910 than it was in 1902?
A. Higher.
Q. How much higher?
A. From 15 to 20%; I have in mind now Northern irion; we use practically all northern iron.
128 Q. What did it cost in 1902?
A. About $13.00.
Q. What did it cost in 1910?
A. About $15.50.

Q. About $15.50?
A. Yes.

The next witness, WILLIAM QUIGGINS, called in behalf of defendant testified as follows:

Direct examination by Mr. RUTLEDGE:

Q. Where do you live, Mr. Quiggins?
A. Caneyville, in Grayson County.
Q. In Kentucky.
A. Yes sir.
Q. What business — you engaged in?
A. Farming and in the timber business.
Q. How long have you been in the timber or lumber business?
A. Well, I have been in the lumber business for about twenty years first and last.
Q. Where are your lumber plants located?
A. One at Caneyville and one at Troy, in Lyon County.
Q. Did you ship or have you within recent years shipped any lumber of any character to the International Harvester Company, of Chicago?
A. Yes.
Q. When did you begin to ship lumber to the International Harvester Company?

129 Objected to.

A. I began shipping in 1905.
Q. What did you ship at that time?
A. I shipped dimension stuff, single trees, double trees, neck yokes and squares, for International Harvester Co. re-peares and binders.
Q. In what condition was the timber when you shipped it, or as shipped by you?
A. I don't understand you exactly.
Q. Was the material that you shipped finished single trees and double trees or in the rough?
A. In the rough, on the block.
Q. How much of this material did you ship to the International Harvester Co. in 1905 and 1906?
A. Well, in 1906 we shipped quite an amount; I don't know exactly how many cars, but I would say anywhere from 40 to 60 cars.
Q. Have you shipped to them each year since then or not?
A. Yes sir.
Q. Have you been shipping to them this year and last year?
A. Yes sir, shipping now, yes sir.
Q. Has there been any increase in the price of this material since you first begun shipping?
A. Yes sir.
Q. Does the International Harvester Co. pay more for it now or less for it now?

Objected to by plaintiff.

By the COURT: What they are paying now is not material; compare 1910 with 1902 and the years back of 1910.

130 Q. Is there any difference in the price paid by the International Harvester Company in 1906 and the price paid in 1910, up to March, 1911?

Objected to by plaintiff.

By the COURT: You may ask if he sold it at the regular market price.

Q. Did you sell that material to the International Harvester Co. at the regular market price?
A. Yes sir.
Q. Has there been an increase or decrease in the price from the time you first begun to ship until March say, 1911?
A. Yes sir; I got an advance in 1906 and in 1907.
Q. What advance was there, Mr. Quiggins?
A. Well, on the different kinds of timber different advances; on some I got 17% advance and some I got 25%; on the second growth hickory got about 25%.
Q. Then the advance from 1906 when you first begun shipping up until March 1911, was from 17½ to 25%, is that correct?

Objected to.

By the COURT: Your question is leading, but you may ask him that.

A. Yes sir.
Q. What character of lumber did you ship then in 1906 and have you been shipping since?
A. Single trees, double trees and neck yokes.
Q. What sort of lumber, oak or hickory?
A. Hickory principally.
Q. Have you shipped any other lumber except hickory?
A. Yes, we shipped oak and ash and poplar.

131 Q. And these various woods have increased in the per cent you have stated?
A. Yes sir.

Cross-examined by Mr. MALLORY:

Q. How did you happen to be in Elkton to-day, Mr. Quiggins?
A. Sir?
Q. How did you happen to be in Elkton to-day?
A. Why, I was called from New Albany by Mr. Gardner, who told me Mr. Rutledge wanted me here today at court.

By Mr. BROWDER: We will admit we brought him here to testify in this case.
By Mr. MALLORY: I don't want you to admit anything.

Q. You came here at the instance of the International Harvester Company to testify in this case?
A. Yes.

Q. At the instance of the Company you have been selling your goods to for the last five or six years?
A. Yes.
Q. And still sell to?
A. ——.
Q. When did you say this increase in the price of stuff was?
A. 1906 and 1907.
Q. Hasn't been any increase since 1907?
A. Yes sir.
Q. How much?
A. Just last year, about June or July, we got an advance on one kind of hickory, second growth hickory.
Q. Has there been an increase in the price of hickory since 1907 up to the 2nd day of March of this year?
A. I can't say as to that.
Q. Don't you know that there has been a decrease in the market price of hickory timber since that time?
A. No, not that I got out.
Q. I am not asking you what you got, I am asking you about the market?
A. That is all I know about the market, the kind I buy.
Q. You are just telling about what you sell?
A. Yes sir.
Q. You don't know anything about the market price, except the price you sell at?
A. Yes sir.
Q. And that is what you have been testifying about?
A. Yes.

Redirect examination by Mr. RUTLEDGE:

Q. You do know what the market price is of the stuff you have been selling?
A. I say, the kind I have been selling.
Q. You have been selling it at the market price have you not?
A. Yes, sir.

Recross-examined by Mr. MALLORY:

Q. You stated you didn't know anything about the general market value of hickory and of oak and all that you have been testifying from is the price you have been getting from the International Harvester Company for——
A. And what I have been paying for it.
Q. And you have been buying it for the purpose of selling it to the International Harvester Company?
A. Yes, sir.
Q. And not for the purpose of selling to anybody else?
A. Yes sir.

The next witness, M. C. RONAYNE, called in behalf of the defendant testified as follows:

Direct examination by Mr. RUTLEDGE:

Q. Mr. Ronayne, where do you live?
A. 521 Millard Avenue, Chicago.
Q. What business are you engaged in there?
A. Manufacture of agricultural implements.
Q. With what Company are you connected?
A. International Harvester Company.
Q. How long have you been connected with the International Harvester Company?
A. Since 1902.
Q. Do you hold a position with them? If so, in what capacity do you work with that company?
A. Well, I look after the pay roll and the timekeeper of the works of the International Harvester Company.

134 Q. Do you look after the pay roll and time in all the various plants of the International Harvester works?
A. Yes.
Q. Or in only one?
A. All.
Q. Do the records you keep cover the labor that is done in all the various factories where the harvesters and binders and mowers and rakes are manufactured?
A. Yes.
Q. Does it or not include anything other than the labor in those various plants?
A. Nothing outside of the labor at the various plants; it includes the organization of the various plants, superintendent down to workmen.
Q. But it only includes, if I understand you the time and pay roll of those who are connected directly with the various plants and none of the head officers of the Company?
A. No, sir.
Q. Are you familiar with the price of labor that enters into the construction of mowers and binders and hay rakes manufactured by the International Harvester Company and sold by it, International Harvester Company of America?
A. Do you mean the labor applied against each machine, mower and rake?
Q. No, I am asking the general price of labor?
A. Yes, sir, yes, as a whole.
Q. Do you know whether there has been an increase or decrease in the price of that labor since 1902?

135 A. Yes, sir.
Q. I wish you would state to the jury what has been the increase or decrease in the price of labor entering into the construction of the mowers and binders and rakes and other machinery sold by the International Harvester Company of America, since 1902, down to March, 1911?

The plaintiff objects; objection overruled, to which ruling the plaintiff excepts.

A. The increase from 1902 to 1911 was 27.01%.

Q. Do you mean by that they paid 27.01% more in 1911 than they paid in 1902?

The plaintiff objects; objection overruled, to which ruling the plaintiff excepts.

A. Yes.

Q. Do you know what has caused this increase, Mr. Ronayne?

The plaintiff objects; objection overruled, to which ruling the plaintiff excepts.

A. I can't answer that question direct for this reason: I am in the labor department; I keep track of what is done. The manufacturing department adjusts the wages; but I know in 1910 there was instructions issued to increase the wages of the men,—more that year than any other time.

Q. Has that increase been a steady advance from 1902 up to the present time?

The plaintiff objects; objection overruled, to which ruling the plaintiff excepts.

A. It may one or two years been about the same, but from 1902 to 1911 inclusive there was a gradual increase; or, I could put it this way, for eleven months of 1911 there has been——

136 Objected to by Mr. Mallory.

By the COURT: Never mind what occurred since March, 1911.

By Mr. BROWDER: Confine yourself back of March, 1911.

A. I would like to correct a statement I have made: Up to March the increased—1911—was 26.8% and not 27.01%; 27.01% was up to and including July, 1911.

Q. It had increased from 26.8% up to 27.01% between March and July?

A. Yes.

Q. Mr. Ronayne, do you mean this increase you have mentioned is the increase per man, paid each man in 1911 over what was paid in 1902?

A. Yes.

Q. And the 26.8% that you have mentioned represents the increased cost of labor entering into the manufacture of these machines in 1911 over what it was in 1902?

Objected to by plaintiff.

By the COURT: He has made his statement about that.

Defendant excepts.

Cross-examined by Mr. MALLORY:

Q. What do you mean by an increase of 27.01%.

A. That the wages paid the men increased that per cent. In other words, when I say that the men's wages was increased 27.01% I mean that represents—that is a man—Well, I will put it this way: we arrive at that figure by taking the gross earnings of all the men at the works and their total hours worked by all the men; we divide the gross earnings by the total hours and we get a certain rate per
137 hour; we did that in 1902; we do that every year; do it semi monthly; well that in 1902 and 1911 is an increase of 26.8%.

Q. What labor does that cover?

A. That covers all labor at the works; every dollar paid out at the works.

Q. Superintendents and foremen?

A. Superintendents and foremen.

Q. And hod carriers and all?

A. Well, if there are any hod carriers.

Q. You don't have many hod carriers around the International Harvester Company?

A. ——.

Q. What was the increase in 1902 to 1903?

A. I haven't got that by years; I didn't—but it went up gradually; some years it may run about the same.

Q. About how many employees do you have?

A. You mean at all the works?

Q. Yes, at all the works.

A. Approximately 27,000.

Q. Approximately 27,000.

A. Yes.

Q. And a great many of those men have been with you since the organization of the International Harvester Company in 1902?

A. Yes sir, a good many of them have.

Q. And they are more proficient in their work now than they were then?

A. I am not in a position to answer that; my personal knowledge is that the men do not work as hard now as they did in 1902.
138 Q. Lots of these men that were doing a grade of work in 1902 are worth more now than they were in 1902, are they not?

A. That might be the case in some instances; but to what extent I couldn't say.

Q. They are continually making improvement-?

A. You see that might be true, but you could say for ten years prior to 1902 they may be going downwards.

Q. You say you have been with this company since its organization in 1902?

A. Yes.

—. ——.

A. They make all lines of agricultural implements.

Q. How many different grain binders do they manufacture?

A. Well, I am not in position to answer that question; the International Harvester Company is a big concern, and I am on labor and don't have much to do with anything else,—that is the production end of it, and I haven't looked at the production figures in a year or two years.

Q. You know what binders they make?

A. You mean the names?

Q. Yes sir?

A. They make the McCormick, the Plano, Champion, Milwaukee, Deering.

Q. Do they make the Osburn?

A. The Osburn.

Q. Did you name the Champion, do they make the Champion machine?

A. Yes sir.

Q. That is the old Warder-Bushnell Glassner Company, isn't it?

A. To the best of my knowledge it is.

Q. That is the original manufacture of what is known as the Champion machine?

139 A. Yes sir.

Q. The International Harvester Company succeeded and took over all these companies and make all these machines?

A. That is in the organization; I am not in a position to answer that.

Q. Well, does the McCormick Machine Company now make any machines?

A. The International Harvester Company manufactures the machines.

Q. They have a separate department of the McCormick machine?

A. Yes, separate works.

Q. They have separate works for the Milwaukee Machine Co. do they not?

A. The Milwaukee works is at Milwaukee, Wisconsin.

Q. I say it has a different works for these different companies?

A. Yes sir.

Q. Which one of these companies have their places or works at Chicago?

A. The McCormick and Deering at Chicago.

Q. They have separate plants?

A. Yes sir.

Q. And these machines are all manufactured at these different plants?

A. Yes sir.

Q. And separate accounts kept of these Companies?

A. Yes sir, they keep track——

Q. They keep the cost of labor of the Champion Co. separate from the cost of the Milwaukee Co.

A. That I am not able to answer.

Q. Don't you keep the books?

140 A. No, I don't have anything to do with the cost of labor as applied to machines. I look after the labor as a whole.

Q. Just tell the jury what you do do?
A. I keep track of the amount of wages paid out.
Q. Paid out for what?
A. Paid out at the works.
Q. Do you go to the works?
A. No, I get reports, and go to them occasionally.
Q. You don't do anything but look at the reports?
A. Well, I put them together and make statements for the manufacturing departments so that they will be in touch with the earnings of the men and number of men employed.
Q. You don't keep any books, but simply receive these reports and make figures on them, that is all, is it?
A. It is in connection with time keeping and pay roll.
Q. Your salary included in the list of these you have been talking about?
A. Yes sir.

Redirect examination by Mr. RUTLEDGE:

Q. I understand, Mr. Ronayne, that reports are made to you from these various departments and these reports are tabulated by you and a statement gotten out from the reports?
A. Yes sir, that is it.
Q. How often are these reports sent in?
A. Sent in from each works each two weeks, semi monthly.
Q. And you make your report from these semi monthly statements which are delivered over to you?
A. Yes sir.

141 Thereupon the defendant announced through and renewed its motion for a peremptory instruction, which motion was overruled, to which the defendant excepts.

STATE OF KENTUCKY,
County of Todd, sct:

I, S. F. Davis, Official Stenographic Reporter of the Todd Circuit Court, do hereby certify that the foregoing 70 pages constitute and contain a true and correct stenographic report of all the oral evidence heard upon the trial of this action of Commonwealth of Kentucky vs. International Harvester Company of America, tried at the December term, 1911, of the Todd Circuit Court; Judge W. P. Sandidge presiding.
Witness my hand this the 11th day of December, 1911.

S. F. DAVIS,
Official Stenographic Reporter, Todd Circuit Court.

142 STATE OF KENTUCKY,
County of Todd, sct:

I, W. P. Sandidge, Judge of the Todd Circuit Court, who presided at the trial of the case of Commonwealth of Kentucky vs. International Harvester Company, of America, held at the court house

in Elkton, Kentucky, at the December Term, 1911, of the Todd Circuit Court, do hereby attest as correct the foregoing transcript of evidence heard upon said trial, the same having been examined by the undersigned and found to be correct.

Witness my hand as said Judge, this the 14th day of December, 1911.

W. P. SANDIDGE,
Judge Todd Circuit Court.

Filed December 14th, 1911.

Attest:
JNO. A. GOODMAN,
Clerk Todd Circuit Court.

143 With the foregoing transcript there was filed the following statement, to-wit:

Court of Appeals of Kentucky.

INTERNATIONAL HARVESTER COMPANY OF AMERICA, Appellant,
vs.
COMMONWEALTH OF KENTUCKY, Appellee.

Statement.

(*a*). The names of appellant and appellee are as given above.

(*b*). The judgment appealed from was rendered on December 5th, 1911, at the December Term 1911, of the Todd Circuit Court, and may be found on page 23 of this record.

(*c*). Neither summons nor warning order desired.

(*d*). James Garnett, Attorney General, Frankfort, Ky. and J. R. Mallory, Elkton, Ky., are counsel for appellee.

BROWDER & BROWDER,
ARTHUR M. RUTLEDGE,
Attorneys for Appellant.

144 Afterwards at a Court of Appeals held in and for the Commonwealth of Kentucky at the Capitol, in Frankfort, on the 18th day of April, 1912, the following order was made, to-wit:

INTERNATIONAL HARVESTER COMPANY OF AMERICA
vs.
COMMONWEALTH OF KENTUCKY.

Todd.

Ordered that this case be submitted.

Afterwards at a Court of Appeals held as aforesaid, on the 18th day of April, 1912, the following orders and judgments were entered, to-wit:

INTERNATIONAL HARVESTER COMPANY OF AMERICA, Appellant,
vs.
COMMONWEALTH OF KENTUCKY, Appellee.

Appeal from the Todd Circuit Court.

The Court being sufficiently advised it seems to them there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed and that appellee recover of appellant ten per cent damages on the amount of the judgment superseded herein, which is ordered to be certified to said Court.

It is further considered that appellee recover of appellant its costs herein expended.

145 On the same day and at the same time, to-wit, April 18, 1912, the Court of Appeals delivered an opinion herein, which is in words and figures following, to-wit:

146 Court of Appeals of Kentucky, April 18th, 1912.

INTERNATIONAL HARVESTER COMPANY OF AMERICA, Appellant,
v.
COMMONWEALTH OF KENTUCKY, Appellee.

Appeal from Todd Circuit Court.

Opinion of the Court by Judge Carroll—Affirming.

In a proceeding by penal action instituted in March 1911 the Commonwealth recovered a judgment in the Todd circuit court against the appellant company for $2,500 00 for violating the anti-trust laws of the State found in Sections 3915 and 3941*a* of the Kentucky Statutes.

Before entering its plea of "not guilty" to the penal action, the appellant company submitted the following demurrer, which was properly overruled by the lower court—

"Not waiving other grounds of demurrer, but insisting thereon, the defendant International Harvester Company of America hereby assigns as one ground for its demurrer herein that the act of May 20, 1890, being chapter 101 of the Kentucky Statutes, under which this action was instituted, and by virtue of which said action is sought to be maintained, must be taken, considered and read in connection with the act approved March 21, 1906, entitled "an act permitting persons to combine or pool their crops of wheat, tobacco, and other products, and sell same as a whole and making contracts
147 in pursuance thereof valid," and when read, taken or construed in connection with said act of March 21, 1906, said act of May 20, 1890 denies to it and other persons within the jurisdiction of the State of Kentucky the equal protection of the law, and

is in violation of the Fourteenth Amendment of the Constitution of the United States, and is void."

The act of May 20, 1890 did not deny to the appellant company the equal protection of the law, nor is it in violation of the Fourteenth Amendment of the Constitution of the United States. Commonwealth v. International Harvester Co., 131 Ky., 551; International Harvester Co. v. Commonwealth, 137 Ky., 668; International Harvester Co. v. Commonwealth, 144 Ky., 403.

A reversal of the judgment is asked for these reasons given by counsel for the appellant in their brief—

"(1) Because the Commonwealth failed to prove that the appellant sold in any form machinery or repairs in Todd county within the year covered by the petition;

(2) Because the Commonwealth failed to show that the market conditions were normal or similar to conditions existing prior to the advance in price; and

(3) Because the court failed to instruct the jury that it should consider the improved condition of the machines in determining the question of its real value."

It will be observed that there is no issue made that the Commonwealth did not sufficiently prove that the appellant company entered into a combination with other companies for the purpose of regulating, controlling and fixing the market value of Harvesting and other farm machinery; or that in pursuance of such combination it did not regulate, control and fix the price of the machinery sold by it. It was, however, essential that the Commonwealth should prove by direct or circumstantial evidence a sale of some of the machinery manufactured or controlled by the appellant company in Todd county within the period covered by the petition but not necessary that the Commonwealth should prove directly and unqualifiedly a sale by the appellant company in Todd county within the time named in the penal action. The fact that such a sale was made may be shown indirectly or by circumstantial evidence. In other words, that character of evidence that in ordinary penal actions would be sufficient to establish the existence of any material fact will be sufficient to establish the fact of the sale in a prosecution under the anti-trust statute. Upon this point, the Commonwealth introduced J. L. Orr and H. C. Miller, both of whom testified in substance that in 1910 they were engaged in the sale of agricultural implements in Todd county, and purchased within a year next before March 1911 harvesting machinery and other farm implements from the appellant company, and the articles so purchased were delivered to them in Todd county. This evidence was, we think, sufficient to show a sale of the machinery by the appellant to these dealers in Todd county. But, it is insisted that they were not asked where they purchased the machinery and that it was indispensible that the Commonwealth should have shown by these witnesses, or other evidence, that the machinery was actually purchased by and sold to them in Todd county. But, if, as these witnesses testified, they bought the machinery, and it was delivered to them by

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the appellant company in Todd county, the reasonable and fair inference from this evidence is that the sale took place in Todd county.

Considerable importance is attached by counsel for appellant to a written contract entered into between the company and the Todd County Hardware Company, with which Miller was connected, as illustrating that the sales testified to by Miller were made in Louisville, Jefferson county, Kentucky and not in Todd county, Kentucky. The contract does not state where it was entered into, or executed, but there is evidence that it was signed by the purchaser and an agent of the company in Todd county, subject to approval
149 by a general agent, and that it was sent to and approved by a general agent in Louisville. Whether the approval of this general agent was indispensible to the completion of the contract does not appear, nor is it shown that it was to be approved by a general agent before becoming effective, nor is there any evidence that the agent who signed the contract in Todd county did not have authority to enter into a binding contract for the company. The mere isolated fact that the contract was to be approved in Louisville was not sufficient to overcome the presumption of its execution in Todd county, arising from the undisputed evidence that the contract was signed in that county by the purchaser and an agent of the company and the goods delivered to him in that county.

Upon the point that there was no showing that the machinery was sold at a price above its real value, there is conflict in the evidence. The witnesses for the Commonwealth testified that the appellant company, after it obtained control of the machine companies that previous to the combination did an independent business, advanced the price of the machinery between 10 and 15 per cent. For example, a machine that sold before the combination at $85.00 was sold afterwards for $101.00. Leaving out of the question of the advance in the prices of materials and labor, the economic and business conditions were substantially the same before the price was advanced as they were afterwards; and, if the reasonableness of the advance in price cannot be sustained upon the ground that it was made necessary by the advance in the price of the materials and labor entering into the manufacture of the machinery, the evidence, together with the reasonable and legitimate inferences that might be drawn therefrom, was sufficient to show that the machinery after the advance was sold at a price above its real value. The evidence as to the advance in the price of material and labor is very conflicting. The witnesses for the Commonwealth said that the advance in material and labor was not equal to the advance into the price of the
150 article, while the evidence for the appellant company tended to show that the advance in the price of machinery did not keep pace with the advance in the price of material and labor. It is worthy of notice, however, that the witnesses for the Company do not seem to have taken into consideration the large amount saved to the company in the sale of its machinery after the combination as compared with the cost of selling before it was entered into. Before the combination was entered into, six companies were engaged with each other in active competition in selling harvesting and farm ma-

chinery. Each of these companies employed different managers and agents. But, after the appellant company obtained the control of these six establishments, one sales agent did the work that was formerly done by six, and it is fair to assume that a corresponding decrease in the number of employés was made in many other departments of the business. The result of this, of course, would be a material decrease in the cost of the article to the company when put upon the market, and this item is we think entitled to no little weight in determining whether or not the machinery was sold at a price above its real value. The cost of putting an article on the market and selling it is entitled to as much consideration as the cost of its manufacture in determining the price at which the article should be sold. In other words, if there was an increase of $5.00 in the cost of manufacturing an article, and a decrease of $5.00 in the sale of it after it was manufactured, it is apparent that the increased cost of manufacture would not add anything to the real cost of the article to the manufacturer; and, so, in ascertaining whether or not an article is sold above or below its real value, the cost of sale as well as the cost of manufacture is to be taken into consideration, although this feature seems to have been overlooked by the company's witnesses in their statements that the increase in the price of the article was made necessary by the increase in the advance of material and labor.

As illustrating in a most convincing way that the appellant
151 company was selling harvesting machinery and farm implements at a cost above the real value, one of the witnesses for the Commonwealth testified without contradiction that

"what we call 'net extras,' which includes chains, sections, guards, knife-heads, pitmans, and everything of that sort, is 25 to 30 per cent cheaper than it was in 1902; if there has been any change in the malleables and castings, I don't know—very little—maybe some pieces change in this, but very little.

Q. I will get you to state whether or not there is competition in these things—whether or not companies other than the International Harvester Company make them and sell them? A. Oh, yes sir, three or four or five make them. Q. Can you name some of them? A. Whitman-Barnes makes them; there is two other concerns that makes them—peculiar names—net extras for all machines—everything made. Q. Can be used for all machines? A. Yes. Q. And those 'net extras' as you call them, are cheaper now by 25 or 30 per cent than they were in 1902? A. Yes sir. Q. These 'net extras' the prices about the same now as in 1910, last year? A. Cost the same this year as they did last year."

When it is kept in mind that these extras were made out of practically the same material as the machines and with the same class of labor it is not an unfair inference to draw from this evidence that these independent competing concerns that sold extras in 1910 at a cost of 25 to 30 per cent less than they were sold in 1902, made a reasonable profit on them, and sold them at a fair price not above their real value and that the machinery and implements sold by the appellant company in 1910 at an advance of 10 or 15 per cent above

the price at which they were sold before the combination was entered into were sold above their real value.

152 In reference to the failure of the court to give the instruction asked by counsel for appellant, that in determining the real value of the machines sold by it, the jury should consider the improved condition of the machines if they believe from the evidence such improvement enhances their real value. This identical question was raised in the case from Bullitt County of International Harvester Company of America v. Commonwealth, 147 Ky., 564, and we there held that it was not error to refuse to give such an instruction. Indeed, every material question raised in this case was made and considered in the Bullitt county case, in which the facts were substantially similar to the facts of this case. The opinion of the court in that case answers in such a full and satisfactory manner all of the reasons advanced for reversal by counsel in this case that we have not thought it necessary to write a more elaborate opinion.

Our conclusion is that no error to the substantial rights of the appellant company appears in the record, and the judgment is affirmed.

Browder & Browder, Russellville, Ky.; Arthur M. Rutledge, Louisville, Ky., for Appellant.

James Garnett, Att'y-Gen'l; M. M. Logan, Ass't Att'y Gen'l, Frankfort, Ky., for Appellee.

[Endorsed:] April 18, '12. International Harvester Co. vs. Com. of Ky.

153 Afterward at a Court of Appeals held in and for the Commonwealth of Kentucky, as aforesaid, to-wit: on May 7th, 1912, the following order was made, to-wit:

INTERNATIONAL HARVESTER COMPANY OF AMERICA
vs.
COMMONWEALTH.

Todd.

Came the appellant by counsel and filed a petition with notice and moved the Court to grant a re-hearing herein, which motion is submitted.

The petition for rehearing filed by the foregoing order is in words and figures following, to-wit:

154 Court of Appeals of Kentucky.

On Appeal from Todd Circuit Court.

INTERNATIONAL HARVESTER COMPANY OF AMERICA, Appellant,
vs.
COMMONWEALTH OF KENTUCKY, Appellee.

Petition for Rehearing by Appellant.

We do not propose in this petition to re-argue the case so far as concerns the errors assigned, the giving and refusing of instructions, and the failure of proof. We do, however, desire to call the court's attention again to the Federal questions involved. Upon this subject the court, in its opinion, uses the following language:

"The act of May 20, 1890, did not deny to the appellant company the equal protection of the law, nor is it in violation of the Fourteenth Amendment of the Constitution of the United States. Commonwealth v. International Harvester Co., 131 Ky. 551; International Harvester Co. v. Commonwealth, 137 Ky. 668; International Harvester Co. v. Commonwealth, 144 Ky. 403."

155 The opinion in the case of Commonwealth v. International Harvester Company, 131 Ky., 551, referred to in the above extract, was that of a bare majority of the court. In the dissenting opinion it was pointed out that to leave to a jury the question as to whether the price of a given article was above or below the reasonable value of that article rendered the law so uncertain that it would be impossible for anyone to tell in advance whether he was violating it. In other words, unless the vendor of an article struck the exact mean between too low a price and too high a price, such exact mean to be determined by a jury, the vendor would be guilty of a crime.

There are many elements which enter into the price that may be charged by the vendor for any article he may desire to sell. Thus, take the element of cost: it may be small or great as the skill of its producer may determine; one producer may have economical methods, another wasteful methods; one vendor may have an economical system of putting his wares upon the market; another, a more extravagant system; there may be a scarcity of the article and many buyers desiring it; there may be a surplus of the article, and many sellers desiring to dispose of it. Take the case of an agricultural product—the intrinsic value of wheat or corn or hay or tobacco one year is no greater than in another year, but as there is a good season or a bad season the price fluctuates. It costs no more to raise one of these agricultural products where the crop is good in one section and bad in another, than it does to raise the same quantity of the product where the crop is good in all sections. As popula-

156 lation increases there is an increased demand for many articles. As the ability of men to buy increases there are more who are willing to pay the larger price for the same article or for a better article.

It so happens that Kentucky is mainly an agricultural and not a manufacturing State. When, therefore, it is left to a jury to say whether a particular article is sold at a price greater than its real value, if it is an agricultural product, it is submitted to a jury to say whether the price of that which they ordinarily sell is greater than it should be. On the contrary, if the product happens to be one of manufacture, there is submitted to a jury which buys, the question as to whether the price is greater than it should be.

We submit that the history of anti-trust legislation in Kentucky since and including the year 1906, shows that it was the purpose of the Legislature to enable the farmers of the State to obtain a higher price for their products by allowing them to combine among themselves and put the control of such agricultural products in the hands of one person, rather than leave such products open to free competition among sellers. And we further submit, that the enforcement of the law has been along these lines.

We have no complaint whatever to make against the policy of the Legislature of Kentucky in the adoption of the Act of March 21, 1906 (Acts of 1906, p. 429, Ky. Stat., Sec. 3941*a*), nor of its adoption of the Act amending the third section of this Act, approved March 13, 1908 (Acts of 1908, p. 38, Ky. Stat., Sections 3941*a* and 1358*b*).

We submit that not only is the purpose of these acts ex-
157 plained on their face but also their purpose is indicated by the manner in which, since their passage, the anti-trust laws of Kentucky have been enforced.

The Act of March 21, 1906, by its first section, makes it lawful for any number of persons to "combine" unite or pool any or all of the crops of wheat, tobacco, corn, oats, hay, or other farm products raised by them, * * * in order or for the purpose of obtaining a greater or higher price therefor than they might or could obtain or receive by selling said crops separately or individually."

The fourth section of this Act is as follows:

"Whereas, many persons of this Commonwealth now desire to combine their respective crops of tobacco, wheat, corn, oats, hay and other farm products, an emergency is now declared to exist which requires that this act should, and it shall, take effect from and after its passage and approval by the Governor."

The Act amending this Act, approved March 13, 1908, imposed a penalty for the violation of a pooling agreement, such penalty to be imposed not only upon the pooler who should violate his contract but upon any person who should knowingly purchase the pooled crop. The second section of this Act is as follows:

"Whereas, many crops of tobacco and other products have been combined and pooled in this State, under contract and agreement entered into for the purposes set out in the above section, an emergency is now declared to exist, which requires that this Act should and it shall take effect from and after its passage and approval by the Governor."

This last Act has been the subject of construction in a number of cases in this court. We need only refer to the following:

158 O'Bannion v. Commonwealth, 113 S. W., 907; Commonwealth v. Hodges, 137 Ky., 233; Collins v. Commonwealth, 141 Ky., 565.

A reading of these cases, as well as the pioneer case of Owen County Burley Tobacco Society v. Brumback, 128 Ky., 137, will show beyond controversy what is known of all men in Kentucky—that the fourth section of the Act of 1906, which we have above quoted, and the second section of the Act of March 13, 1908, which we have above quoted, are true; that an emergency did exist in reference to the first of these acts, because of the desire of many persons in the Commonwealth to combine their respective crops; and that an emergency did exist in reference to the Act of March 13, 1908, because many crops of tobacco and other products had been combined and pooled in this State.

It is a significant fact that not a single indictment or a single penal action has ever been brought against a combination having for its purpose the pooling of agricultural products for the purpose of obtaining a greater price therefor; while on the other hand, numerous prosecutions, by way of indictment or penal action, have been instituted by the Commonwealth against combinations where the article disposed of was one of manufacture.

We need only to ask the court to recollect a number of cases brought to this court, of indictments and penal actions against the International Harvester Company of America, the American Tobacco Company and the Good Roads Machinery Company. Indeed, we may confidently assert that the law of supply and demand, the economic laws of trade, have been left to govern persons dealing in agricultural products in Kentucky, whereas, as to those
159 dealing in manufactured products, effort has been made by the Commonwealth to restrict their price to what was—not according to any certain measure, but simply by what a jury might determine—a price neither higher nor lower than their value.

It is to be remembered that the Fourteenth Amendment is not directed simply against State law. In this it is unlike that provision in the Constitution of the United States which prohibits a State from passing any law impairing the obligation of contracts; for the Fourteenth Amendment provides that no State shall make or enforce any law which shall deny to any person within its jurisdiction the equal protection of the laws.

This is a prohibition against State action of any kind which produces the result forbidden.

In Henderson v. Mayor, 92 U. S. 259, the Supreme Court of the United States condemned a law of the State of New York, not simply upon its language but upon its effect, Mr. Justice Miller saying, at p. 268:

"In whatever language a statute may be framed its purpose must be determined by its natural and reasonable effect."

So in Ex parte Virginia, 100 U. S. 339, the court said, at p. 346:

"We have said the prohibitions of the Fourteenth Amendment are addressed to the States. They are, 'No State shall make or enforce a law which shall abridge the privileges or immunities of citizens of

the United States, * * * nor deny to any person within its jurisdiction the equal protection of the laws.' They have reference to actions of the political body denominated a State, by whatever instruments or in whatever modes that action may be taken.
160 A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning. Then the State has clothed one of its agents with power to annul or to evade it."

Again, in Soon Hing v. Crowley, 113 U. S. 703, the court, in upholding a certain ordinance of the city of San Francisco, said: (Page 710.)

"The principal objection, however, of the petitioner to the ordinance in question is founded upon the supposed hostile motives of the supervisors in passing it. The petition alleges that it was adopted owing to a feeling of antipathy and hatred prevailing in the city and county of San Francisco against the subjects of the Emperor of China resident therein, and for the purpose of compelling those engaged in the laundry business to abandon their lawful vocation and residence there, and not for any sanitary, police, or other legitimate purpose. There is nothing, however, in the language of the ordinance, or in the record of its enactment, which in any respect tends to sustain this allegation. And the rule is general with reference to the enactments of all legislative bodies that the courts cannot inquire into the motives of the legislators in passing them, except as they may be disclosed on the face of the acts, or inferrible from their operation, considered with reference to the condition of the country and existing legislation. The motives of the legislators, con-
161 sidered as the purposes they had in view, will always be presumed to be to accomplish that which follows as the natural and reasonable effect of their enactments. Their motives, considered as the moral inducements for their votes, will vary with the different members of the legislative body. The diverse character of such motives, and the impossibility of penetrating into the hearts of men and ascertaining the truth, precludes all such inquiries as impracticable and futile. And in the present case, even if the motives of the supervisors were as alleged, the ordinance would not be thereby changed from a legitimate police regulation, unless in its enforcement it is made to operate only against the class mentioned; and of this there is no pretence."

To the contrary, in Yick Wo v. Hopkins, 118 U. S. 356, the court, in condemning another ordinance, said (p. 373):

"This conclusion, and the reasoning on which it is based, are de-

ductions from the face of the ordinance, as to its necessary tendency and ultimate actual operation. In the present cases we are not obliged to reason from the probable to the actual, and pass upon the validity of the ordinances complained of, as tried merely by the opportunities which their terms afford, of unequal and unjust discrimination in their administration. For the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States."

162 We respectfully submit that this court cannot shut its eyes to facts which are known of all men; which are apparent upon the face of legislative enactments and the records of this court; and that these facts show that the Acts of March, 1906, and March, 1908, and the conduct of the prosecuting officers of the State thereunder, have produced a discrimination against the appellant and others likewise situated, which is a denial of the equal protection of the laws.

We therefore submit that to require, in fact, the vendors of manufactured products to fix a price upon them at the peril of being compelled to show to a jury that such price is neither above nor below that which the jury shall determine to be a reasonable value, and to allow those selling agricultural products to fix a price, without fear of challenge, is practically the same as if the law allowed the one class to combine to obtain a greater price, and prohibited the same liberty to the other class.

Let us indulge in a simple illustration: By reason of an unusually severe season a large part of the winter wheat crop of the United States has been killed. The result is sure to be that the wheat crop of the United States for the year 1912 will be short. The spring wheat will not be sufficient to make up the deficit. Immediately wheat has risen in the market. The man who has spring wheat for sale will get more for it—not because it will cost him any more to raise it; not because, intrinsically, it is worth more this year than last year, but simply because persons who would buy winter wheat will not be able to get it. No one will think of complaining

163 if the owner of a crop of spring wheat shall charge more for what he raises than he would if there were an abundance of winter wheat. And yet, suppose that by reason of some disaster—for instance, the burning of the warehouses containing a large part of a manufactured product—there should be a scarcity of this article: under the administration of our anti-trust laws the owner of such manufactured product could charge no more for it by reason of these circumstances. He would be compelled to fix his price by some past standard, and could only increase it if he could show that the cost

to him of his small quantity remaining was greater than the cost at some past period.

We submit, in conclusion, that the anti-trust laws of Kentucky, as framed and enforced, allow full play to all economic conditions in reference to agricultural products, at the same time denying the application of such economic principles to manufactured products.

We submit that judging either from the letter of our anti-trust laws, or their practical enforcement, the State of Kentucky does deny to persons in the situation of the appellant the equal protection of the laws, and that this judgment should be reversed with directions to dismiss the petition.

Respectfully,

ARTHUH M. RUTLEDGE,
HUMPHREY & HUMPHREY,
Attorneys for Appellant.

BROWDER & BROWDER,
Of Counsel.

164 Afterward at a Court of Appeals held in and for the Commonwealth of Kentucky, as aforesaid, on the 30th day of May, 1912, the following order was entered, to-wit:

INTERNATIONAL HARVESTER COMPANY OF AMERICA
vs.
COMMONWEALTH.

Todd.

The Court being sufficiently advised, the petition for rehearing in this case is now overruled.

Afterward on the 19th day of June, 1912, the appellant and plaintiff in error filed in the Clerk's office of the Court of Appeals of Kentucky, its assignment of errors, which is in words and figures following, to-wit:

Supreme Court of the United States.

INTERNATIONAL HARVESTER COMPANY OF AMERICA, Plaintiff in Error,
vs.
COMMONWEALTH OF KENTUCKY, Defendant in Error.

Assignment of Errors.

The Plaintiff in Error, the International Harvester Company of America, assigns the following errors as having been committed herein:

1. The Court erred in failing to hold that the Act of the Legisla-

ture of Kentucky, approved March 21, 1906, operated so as to
165 allow the persons therein described to enter into combinations which were forbidden to persons not therein described; and in failing to hold that there was thereby produced an unjust and unreasonable discrimination against the Plaintiff in Error and others similarly situated; and thereby the Plaintiff in Error was denied the equal protection of the laws as guaranteed under the Fourteenth Amendment of the Constitution of the United States.

2. The Court erred in holding that the Act of the Legislature of Kentucky of May 20, 1890; the Act of March 21, 1906, and the Constitution of the State of Kentucky, when read together, had the effect of making it a penal offense against the laws of the State of Kentucky for the Plaintiff in Error to sell the product of its manufacture at a price greater or less than its reasonable value, when there was no provision of the law fixing any standard of such reasonable value but the jury in each individual case was left to determine this question. Such a penal statute is so uncertain, indefinite and unreasonable as, if enforced, would, and as enforced by the judgment herein, did deprive the Plaintiff in Error of its property without due process of law, and deny to it the equal protection of the laws, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States.

3. The Court erred in failing to hold that the purpose and effect, and the manner of enforcement by the authorities of the State of Kentucky, of the said three provisions of the law of the State
166 of Kentucky, mentioned in the second assignment of error, are discriminatory as against the Plaintiff in Error and others situated as is Plaintiff in Error, and in favor of those persons who are mentioned in the said Act of March 21, 1906, and the Plaintiff in Error has thereby been, and by the judgment herein rendered has been, denied the equal protection of the laws, and deprived of its property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States.

4. The Court erred in failing to hold that the Statutes of Kentucky under which this action is prosecuted, namely, the Acts of May 20, 1890 and March 21, 1906, as construed and applied by the Court of Appeals of Kentucky, are in conflict with the Constitution of the United States, and particularly with the Fourteenth amendment thereof, for the following reasons among others, namely: That the said Statutes operate to deny to the defendant the equal protection of the law and to deprive this defendant of its property without due process of law.

ALEX. P. HUMPHREY,
ALEX. P. HUMPHREY, JR.,
Attorneys for Plaintiff in Error.

Filed June 19, 1912.
ROB'T L. GREENE, *C. C. A.*

167 On the same day, to-wit: June 19, 1912, the appellant and Plaintiff in Error, filed in the Clerk's office a Writ of Error

which was allowed by the Chief Justice of the Court of Appeals of Kentucky, and which is returned herewith, following, to-wit:

168 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Judges of the Court of Appeals of Kentucky, Greeting:

Because in the record of proceedings, as also in the rendition of the judgment, of a plea which is in the said Court of Appeals of Kentucky, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between the International Harvester Company of America, Plaintiff in Error, and The Commonwealth of Kentucky, Defendant in Error, wherein was drawn in question the validity of a statute of, or an authority exercised under, said Commonwealth of Kentucky on the ground of their being repugnant to the Constitution of the United States, and the decision was in favor of such validity and manifest error hath happened, to the great damage of said International Harvester Company of America, Plaintiff in Error, as by its complaint appears, we, being willing that error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 17th day of July, 1912, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done
169 therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States, this the 18 day of June, 1912, and of the Independence of the United States of America the 136th year.

[Seal United States of America, Eastern K'ty Dist. Court.]

JOHN W. MENZIES,
Clerk United States District Court, Eastern Dist. of Ky., at Frankfort,
By CHAS. N. WIARD,
Deputy Clerk.

Allowed by

J. P. HOBSON,
Chief Justice of the Court of Appeals of Kentucky.

Filed Jun- 19, 1912.

ROB'T L. GREENE, *C. C. A.*

12—292

170 At the same time, to-wit: on the 19th day of June, 1912, the appellant and Plaintiff in Error filed in the Clerk's office aforesaid, a Writ of Error Bond, which is in words and figures following, to-wit:

Court of Appeals of Kentucky.

INTERNATIONAL HARVESTER COMPANY OF AMERICA, Plaintiff in Error,

vs.

COMMONWEALTH OF KENTUCKY, Defendant in Error.

Know all men by these presents: That we, the International Harvester Company as Principal, and United States Fidelity & Guaranty Company, as surety, are held and firmly bound unto the Commonwealth of Kentucky in the sum of Five Thousand — for payment of which well and truly to be made, we, the International Harvester Company of America, Principal, and United States Fidelity & Guaranty Company, as surety, bind ourselves jointly and severally firmly by these presents.

Witness our hands and seals this 18th day of June, 1912.

The condition of this obligation is such that whereas the said Commonwealth of Kentucky instituted a certain action against the International Harvester Company of America, claiming a penalty of Five Thousand ($5,000) Dollars, and judgment was rendered accordingly in the Todd Circuit Court in the sum of Twenty-
171 Five Hundred ($2,500.00) dollars, and subsequently an appeal was taken from said judgment to the Court of Appeals of Kentucky, which affirmed the same; and, whereas, the said International Harvester Company of America has sued out a writ of error from the Supreme Court of the United States to reverse said judgment of the Court of Appeals of Kentucky.

Now, therefore, if the above bounden International Harvester Company of America shall prosecute said writ of error to effect and answer the judgment, all damages and costs, if it fail to make good this appeal, then this obligation shall be void, otherwise to remain in full force and effect.

INTERNATIONAL HARVESTER COMPANY OF AMERICA,
By ALEX. P. HUMPHREY, JR.
UNITED STATES FIDELITY & GUARANTY COMPANY,
By JAMES H. POLSGROVE, *Att'y in Fact.*

The above and foregoing bond is approved this June 18, 1912.

J. P. HOBSON,
Chief Justice of the Court of Appeals of Kentucky.

Filed June 19, 1912.

ROB'T L. GREENE, *C. C. A.*

172 On the same day, to-wit: June 19, 1912, there was filed in the office of the Clerk of the Court of Appeals of Kentucky, the original citation and proof of service endorsed thereon, and which is attached thereto as follows:

173 UNITED STATES OF AMERICA, *ss:*

To Commonwealth of Kentucky, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington thirty (30) days after the date hereof, pursuant to a writ of error filed in the Clerk's Office of the Court of Appeals of Kentucky, wherein International Harvester Company of America is Plaintiff in Error, and you are Defendant in Error, to show cause, if any there be, why the judgment rendered against the Plaintiff in Error, as in the said Writ of Error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable J. P. Hobson, Chief Justice of the Court of Appeals of Kentucky, this 18 day of June, 1912.

J. P. HOBSON,
Chief Justice of the Court of Appeals of Kentucky.

Citation accepted for the Commonwealth of Kentucky, Defendant in Error, this 18 day of June, 1912.

JAMES GARNETT,
Attorney General of Kentucky.

Filed Jun- 19, 1912.
ROB'T L. GREENE, *C. C. A.*

174 COMMONWEALTH OF KENTUCKY,
Court of Appeals, set:

In obedience to the commands of the attached writ of error, I hereby transmit to the Supreme Court of the United States, a complete transcript of the record, with all things touching the same in the case of International Harvester Company of America, Appellant, vs. The Commonwealth of Kentucky, Appellee, as appears from the records and files of my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of my office.

Done at the Capitol at Frankfort, Kentucky on this the 1st day of July, A. D. 1912.

[Seal Kentucky Court of Appeals.]

ROB'T L. GREENE,
Clerk of the Court of Appeals of Ky.

This Transcript $61.90.

Endorsed on cover: File No. 23,279. Kentucky Court of Appeals. Term No. 292. International Harvester Company of America, plaintiff in error, vs. The Commonwealth of Kentucky. Filed July 8th, 1912. File No. 23,279.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1913.

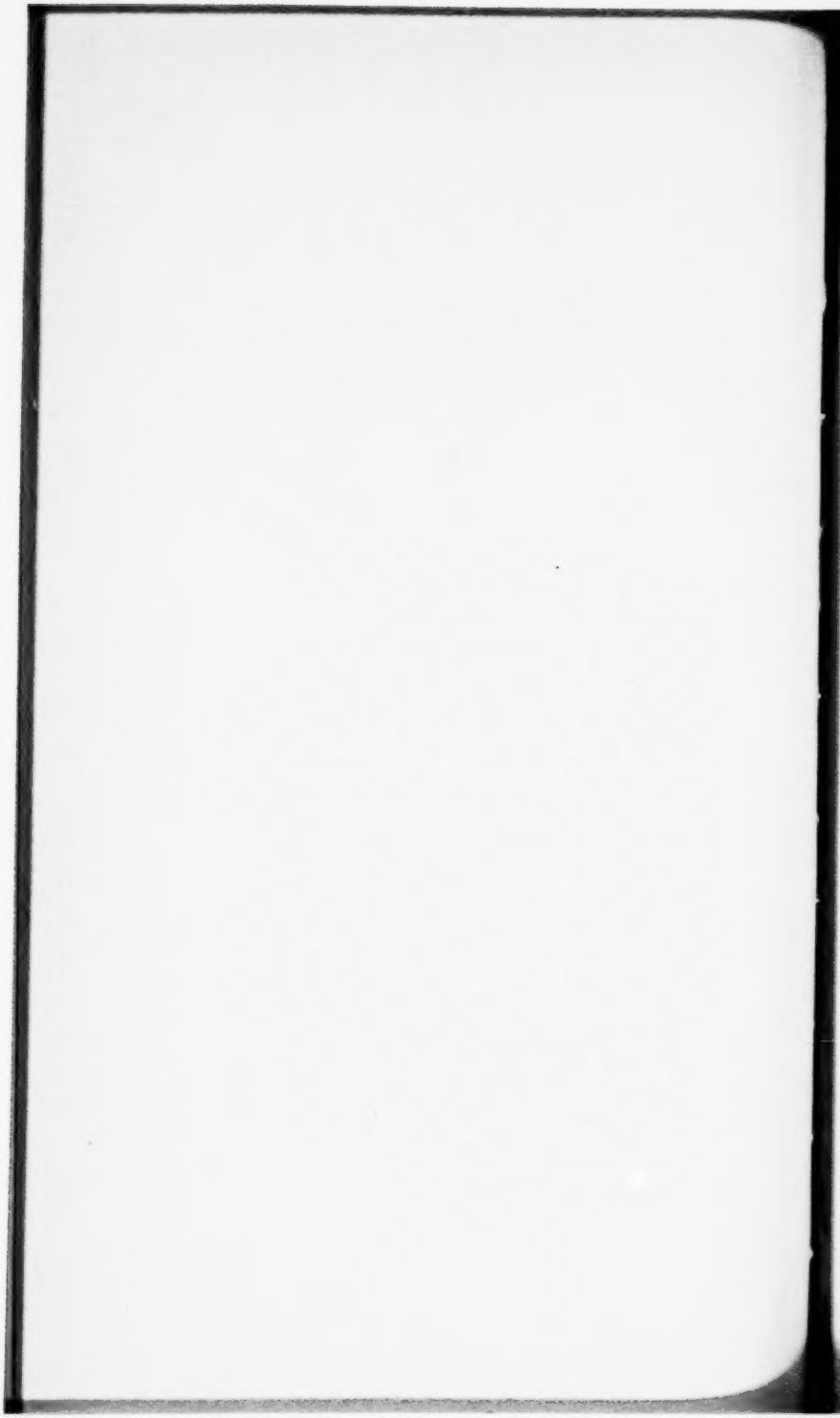
INTERNATIONAL HARVESTER COMPANY OF AMERICA, *Plaintiff in Error,* vs. COMMONWEALTH OF KENTUCKY, *Defendant in Error.*	No. 276. Error to the Court of Appeals of Kentucky. (Bullitt County)
INTERNATIONAL HARVESTER COMPANY OF AMERICA, *Plaintiff in Error,* vs. COMMONWEALTH OF KENTUCKY, *Defendant in Error.*	No. 291. Error to the Court of Appeals of Kentucky. (Grayson County)
INTERNATIONAL HARVESTER COMPANY OF AMERICA, *Plaintiff in Error,* vs. COMMONWEALTH OF KENTUCKY, *Defendant in Error.*	No. 292. Error to the Court of Appeals of Kentucky. (Todd County)

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

ALEX. P. HUMPHREY,
EDGAR A. BANCROFT,
Attorneys for Plaintiff in Error.

VICTOR A. REMY,
Of Counsel.

BUNTHORP-WARREN PRINTING COMPANY, CHICAGO.



SUBJECT INDEX.

TABLE OF CASES CITED.

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INTERNATIONAL HARVESTER COMPANY OF AMERICA, *Plaintiff in Error,* vs. COMMONWEALTH OF KENTUCKY, *Defendant in Error.*	No. 292. Error to the Court of Appeals of Kentucky. (Todd County)

STATEMENT.

In each of these three cases plaintiff in error was prosecuted, convicted and fined—in Bullitt County $5,000, in Grayson County $1500, in Todd County $2500—for alleged violation of the anti-trust laws of Kentucky. The judgments were affirmed in 147 Ky., 564; 148 Ky., 572, and 147 Ky., 795, respectively.

As the only question involved here is the constitutionality of those laws, the three cases are argued together.

In Kentucky the pecuniary penalty imposed for the violation of a law can be recovered by indictment for a misdemeanor, or by a penal action. The latter, though in form a procedure similar to a civil action, is governed by the usual laws applicable to a proceeding by indictment. As an illustration, no answer is required of the defendant other than a plea of not guilty (*Equitable Society* v. *Commonwealth*, 113 Ky., 126; 67 S. W., 388), and the court should instruct the jury that the Commonwealth must prove its case beyond a reasonable doubt. (*L. & N. R. R. Co.* v. *Commonwealth*, 112 Ky., 635; 66 S. W., 505.)

Each of the instant cases was a penal action under the anti-trust law.

REVIEW OF KENTUCKY ANTI-TRUST LEGISLATION.

In 1890 the legislature of Kentucky passed an Act defining and punishing pools, trusts, combines, agreements, etc., to regulate or fix the price or limit the quantity of any commodity as a criminal conspiracy. (Carroll's Kentucky Statutes, Sections 3915-3921.) The first and third sections of the Act of May 20, 1890, are alone material here. They are printed in full in the Brief of the Argument. (Ibid., Sec. 3915 and Sec. 3917.)

The first section of this Act provides:

> "That if any corporation under the laws of Kentucky, or * * * of any other state or country for transacting or conducting any kind of business in Kentucky, or any partnership, company, * * * or individual, * * * shall create, * * * enter into or become a member of * * * any pool, trust, combine, agreement * * * or understanding * * * for the purpose of regulating or controlling or fixing the price of any merchandise, manufactured article or property of any kind, or * * * having for its object the fixing or in any way limiting the amount

> or quantity of any article of property, commodity or merchandise to be produced or manufactured, mined, bought or sold, shall be deemed guilty of the crime of conspiracy, and punished therefor as provided in the subsequent sections of this act."

Section 3 of the Act fixed the penalty of not less than $500 nor more than $5,000 or imprisonment, or both.

After the passage of this Act, but before any cases had arisen under it, Kentucky adopted a new Constitution, taking effect September 28, 1891. Section 198 of this Constitution is as follows:

> "It shall be the duty of the General Assembly from time to time, as necessity may require, to enact such laws as may be necessary to prevent all trusts, pools, combinations or other organizations, from combining to depreciate below its real value any article, or to enhance the cost of any article above its real value."

In *Commonwealth* v. *Grinstead* (1900), 108 Ky., 59, 62; 55 S. W., 720, 722, the Court of Appeals had to consider an indictment for violating the Act of 1890. It did not charge that defendants had combined to depress or increase the price or value of an article below or above its real value, but only that they had entered into a conspiracy as defined in Section 3915, for the purpose of regulating, controlling or fixing the price of merchandise.

It is necessary to bear in mind from the outset the difference between the offense defined in the Act of 1890 and the one defined in the Constitution. The statutory offense is a combination to fix or control price without regard to whether such price is greater or less than the "real value" of the articles. The constitutional provision relates to laws which will forbid combinations to depreciate an article "below its real value" or to enhance its cost "above its real value."

In the *Grinstead* case, *supra,* the Court of Appeals

held that although the statute was broader than the constitution, this did not make it unconstitutional, and it continued in existence, as the constitutional provision did not prohibit the legislature from passing a statute of a wider scope; that the legislature's power was not derived from Section 198, and that the Act of 1890 was no more inconsistent with it than a quart was inconsistent with a pint. (108 Ky., at p. 67; 55 S. W., at p. 722.)

Upon rehearing (108 Ky., 76; 57 S. W., 471) the court said:

> "Surely it cannot be maintained that the legislature was limited to adopting an Act in the language of the Constitutional provision. Had it done so there is strong authority in this State for holding that such an enactment, imposing a penalty for a combination to depreciate below its real value any article, *would be held void for uncertainty.*"

In *Commonwealth* v. *Bavarian Brewing Co.* (1902), 112 Ky., 925, 928; 66 S. W., 1016, 1017, several brewers combined and raised the price of beer so as to cover the Spanish war tax. The Kentucky Court of Appeals upheld the Act of 1890 and construed it as forbidding every combination to fix or control prices without reference to the relation between the prices fixed and "real value."

The same question arose as to this plaintiff in error (under an indictment found in Trimble County in 1905) in *I. H. Co. of A.* v. *Commonwealth* (1907), 124 Ky., 544; 99 S. W., 637, 639. The Court of Appeals followed the ruling in the earlier cases and held that although a conspiracy to fix prices might be formed in another state, yet if in pursuance of it a sale were made in Kentucky, the offense would be there punishable under the Act of 1890.

Such, then, was the anti-trust law in Kentucky from

1890 until the Pooling Act of March 21, 1906, which expressly authorized farmers to pool their products.

Section 1 of this Act is as follows:

> "It is hereby declared lawful for any number of persons to combine, unite or pool any or all of the crops of wheat, tobacco, corn, oats, hay or other farm products raised by them, for the purpose of classifying, grading, storing, holding, selling, or disposing of same, either in parcels or as a whole, in order or for the purpose of obtaining a greater or higher price therefor than they might or could obtain or receive by selling said crops separately or individually." (Carrolls' Stats., § 1784.)

Section 2 states that all such pools, combinations and contracts made for the purposes of such pooling

> "are hereby permitted, and shall not, because of any such combination or purpose of said persons, be declared illegal or invalid."

Section 3 authorizes the persons entering the pool to select agents for classifying, grading, storing, holding and selling of the pooled crops, and that the contracts made by or with such agents

> "shall not, because of any such combination or purpose of such original agreement of such principals so entering into such combination, or of such agent or agents, be declared illegal or invalid."

Section 4 is an emergency clause in these words:

> "Whereas, many persons of this commonwealth now desire to combine their respective crops of tobacco, wheat, corn, oats, hay and other farm products, an emergency is now declared to exist which requires that this Act should, and it shall, take effect from and after its passage and approval by the Governor."

The first case to rise under this Act was *Owen County Burley Tobacco Society* v. *Brumback* (1908), 128 Ky., 137; 107 S. W., 710. Brumback had joined with other producers of tobacco to pool their entire crops with the

Owen County Burley Tobacco Society and allow it to control the sale. Afterward the Society, finding that Brumback was about to withdraw his tobacco and sell it himself, brought suit to enjoin him from so doing, and obtained, in the Circuit Court, a preliminary injunction.

In Kentucky, where a preliminary injunction has thus been granted, the defendant can produce the record before any judge of the Court of Appeals and ask to have the injunction dissolved. When the question involved in such a proceeding is an important one, it is the custom for the judge to whom the application is thus made to have the matter heard before all the judges and to determine the question, not according to his own view, but according to the view of the majority of the judges. Opinions delivered on such motions are printed in the regular series of reports and are regarded as authority. All the judges of the Court of Appeals, with the exception of Chief Justice O'Rear (who happened to be absent), sat upon the hearing of this motion, Judge Carroll delivering the opinion of the court. It was insisted by Brumback that the act of 1906 should be read with the act of 1890 and that, being so read, under the principles laid down by this court in *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S., 540, the whole legislation upon the subject of trusts must fall.

In the *Connolly* case this court had held that an anti-trust law passed by the legislature of the State of Illinois, general in its terms, was rendered unconstitutional by a proviso to the effect that it did not apply to dealers in farm products or live stock.

In the *Brumback* case, however, the court held that the act of 1906 gave an affirmative right to the class of persons within its terms; that it did not in terms deny a similar right to other persons; that Brumback could not

complain because the act was not general in its provisions, and that the question of its effect on the act of 1890 was one to be thereafter determined. The court further held that the act was not in violation of Section 198 of the Constitution, for, while it legalized all agreements to put in the control of the Burley Society the sale of tobacco belonging to various producers, it did not authorize such society to sell the tobacco at a price which was above or below its "real value." We make the following quotation from the opinion (pages 150, 151):

> "To put the question plainly: Is the act invalid, under section 198, because it allows a class of persons to make contracts or agreements with each other, the intent of which is to pool and combine their tobacco, or wheat, or corn, or hay, or other farm products raised by them, and to select an agent to hold the crop or crops so combined or pooled, 'in order or for the purpose of obtaining a greater or higher price therefor than they might or could obtain or receive by selling said crop separately or individually.' The Constitution does not prohibit trusts, pools or combinations; nor does it command the General Assembly to enact laws forbidding trusts, pools or combinations. The lawmaking department is left to determine for itself the necessity that exists for legislation upon this question. It may or may not, in its discretion, act. The section is not self-executing. It only declares that it shall be the duty of the General Assembly from time to time, as necessity may require, to enact such laws as may be necessary to prevent all trusts, pools, combinations or other organizations from combining to depreciate below its real value any article, or to enhance the cost of any article above its real value. A trust, pool or combination, unless created or formed for the purpose of depreciating below its real value any article, or enhancing the cost of any article above its real value, or unless the reasonable effect of the trust, pool or combination would be to depreciate below its real value an article or to enhance the cost of an article above its real value, is not forbidden.

> To put it in another way, it would seem that, so far as this section is concerned, trusts, pools and combinations, the only purpose of which is to obtain a fair and reasonable price for an article, are permitted. The Legislature could not enact a law legalizing a pool or combination of persons for the purpose of enhancing the cost of any article above its real value or depreciating it below its real value; yet it may legalize such pool or combination as is created or organized for the purpose of obtaining fair and remunerative prices."

But although the Act of 1906 expressly legalized all combinations and pooling contracts between the producers of farm products in order to secure greater prices for them, it did not abate the prosecutions, under the Act of 1890, of dealers in manufactured goods.

After the passage of the Act of 1906, plaintiff in error was indicted in Hardin County for violation of the Act of 1890 in the language of that law, without any averment that the prices attempted to be fixed were above or below the "real value" of the article. The Hardin County Circuit Court sustained a demurrer to the indictment. The Commonwealth appealed and the Court of Appeals in *Commonwealth* v. *I. H. Co. of A.* (1909), 131 Ky., 551, 576, 580; 115 S. W., 703, 711, 712, while affirming the judgment, attempted to harmonize the two conflicting Acts and Sec. 198 of the Constitution.

It is sufficient at this point to say that the Court of Appeals, composed of seven judges, by a vote of four judges to three announced the following proposition: That the Act of 1890, Section 198 of the Constitution, and the Act of 1906 were all to be read together as one enactment; that, when so read, and also in connection with the provisions of the Kentucky Constitution similar to those contained in the Fourteenth Amendment to the Federal Constitution and with the said Fourteenth Amendment, they resulted in making lawful all pools and

combinations—of manufacturers and merchants as well as farmers—for the purpose and with the effect of controlling the price of commodities, unless formed to exact prices, or unless prices were exacted, which were greater or less than the "real value" of the article. The court further held that what was the "real value" of the article was a matter to be determined by the jury in trying either a misdemeanor or a penal action. In answer to the objection that there was no standard of sufficient certainty by which the conduct of persons forming combinations could be measured, the court held that this was not true. At one place (page 576) the court said: "The 'real value' spoken of by the Constitution (Section 198) is the market value." In a subsequent part of the opinion, however, this is greatly modified and, as will be hereinafter shown, is entirely departed from.

Judge Hobson delivered a strong dissenting opinion, in which Judges Barker and Lassing concurred. The dissenting judges agreed with the opinion of the majority in holding that the effect of the Act of 1906 was to amend the Act of 1890; but they rejected the idea that the result was the creation of a new offense, saying, that enhancing or depreciating an article above or below its real value, is not defined or denounced either by the Act of 1890 or by the Act of 1906. The dissenting opinion further argued that Section 198 of the Constitution was not self-executing, and that to endeavor to import it as an amendment into the Act of 1890 and the Act of 1906 would be to create an offense not created by either of those statutes.

That the majority opinion was a futile attempt to escape the rule in *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S., 540, is stated in the dissenting opinion:

"The legislature of Illinois passed an Act similar

> to our Act of 1890 but by one provision of it exempted from it agricultural products in the hands of the producer. * * * It was held by the Supreme Court of the United States that the Act was void upon the ground that farmers were exempted from its operation and, therefore, it could not be enforced against anyone. Our Act of 1890 did not exempt farmers from its operation, but the Act of 1906 expressly authorized farmers to do what was forbidden by the Act of 1890. We are unable to see that there is any substantial distinction between an exemption of farmers in the original Act and an exemption of them in a subsequent Act. If the provisions of the Constitution of the United States may be evaded by putting the exemption in a subsequent Act and not in the original Act, they amount to nothing."

The effect of these two laws was frankly described by Governor Willson, in his Message to the General Assembly of Kentucky, on January 7, 1908:

> "We have severe laws against pooling, which it is claimed are ample to suppress and punish all combinations against the farmer, and we have a statute which makes it lawful for a farmer to pool and combine against the buyers, when it is unlawful for them to combine against the farmer."*

The dissenting opinion further stated, that to punish a combination which had for its object the selling of a product for a greater or less amount than its "real value," would be to infringe against the principle laid down in previous decisions of that court, to the effect that some definite standard must be created by the legislature to govern the determination of the guilt or innocence of the person or corporation accused. (The dissenting opinion is printed in full in the Appendix.)

The rule adopted by the majority opinion in the above case—that the indictment or complaint must charge a

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*See *infra*, p. 54.)

combination seeking and effecting a depreciation below or an enhancement above the real value of the article—has since been followed in numerous cases.

American Tobacco v. *Commonwealth*, 115 S. W., 754, 755, 756.

Commonwealth v. *International Harvester Company of America*, 131 Ky., 768; 115 S. W., 755.

In *International Harvester Company of America* v. *Commonwealth* (1910), 137 Ky., 668; 126 S. W., 352, the court had before it an indictment wherein it was alleged that the Harvester Company had entered into a combination and had fixed the price of articles sold by it in the County of Logan above "the actual value" and "above the real and actual value." On appeal from the judgment against the Harvester Company, the Court of Appeals said (page 674):

> "The gist of the offense denounced by our statutes against pooling is that the purpose of the pool is to enhance the value of the article pooled above its real value. Where the design of the poolers is to enhance the value of their product, or where, whatever their design, such is the natural effect of their action, and such as was necessarily foreseen because of its obviousness, the offense is completed."

The court then considered what must be the rules under which the jury will determine what is the "real value" of the article sold. Though it was held that the burden was on the Commonwealth to show that market conditions were normal both before and after the combination was formed, it was also held that *"when there is an absence of * * * panics, widespread strikes, wars, and such, the conditions may be said to be normal."*

The Harvester Company to explain an increase in price had offered to prove that the price of materials which went into the manufacture of the farm imple-

ments sold by it had largely increased; but the court below had rejected this evidence. The Court of Appeals reversed the judgment for refusal to admit this proof,—holding that an instruction should have been given to the effect that if the increase in price was due solely to the increase in cost of labor or material in producing the articles, the verdict should be for the defendant.

On a retrial the defendant proved that the increased cost of labor and materials equaled the increase in the price of the various machines but the case went to the jury, with verdict and judgment against the Harvester Company. On a second appeal *I. H. Co. of A.* v. *Commonwealth,* 144 Ky., 403, 410; 138 S. W., 248, 252, the court, in an opinion by Judge CARROLL, undertook to point out the elements, which are to be considered in reaching a conclusion, as to whether the Harvester Company had sold its harvesting machines at a price greater than their real value. The court said:

> "So many factors enter into its solution that it is not easy to determine when the price of an article has been enhanced above its real value. * * * But the fact that the combination was formed, *in connection with the legal presumption that it was formed for the purpose of fixing and controlling prices,* is sufficient to show, in the absence of countervailing evidence, that an advance in the price prevailing before the combination was entered into, enhanced the price of the article above its real value if market conditions before and after the advance were substantially the same, and the cost of production had not materially increased or in proportion to the advance. * * * Under this rule the Commonwealth made out its *prima facie* case, but the unexplained and uncontradicted evidence of an advance in the price of labor and material entering into the construction of the machines rebutted the inference of guilt, and the court should have directed a verdict

for the defendant. But the Commonwealth on another trial should be permitted to show in chief or in rebuttal that the advance in labor and material entering into the construction of the machines was not sufficient to justify the advance in the price."

These rules will be adverted to and considered more fully hereafter.

But another emergency seems to have arisen in Kentucky. The pooling act of 1906 legalized pooling contracts, but it did not adequately take the place of the "Night-Riders" for the enforcement of the terms of such contracts. Therefore, by the Act of March 13, 1908, Section 3 of the Act of March 21, 1906, was amended by adding the following express provisions:

(*a*) "To prevent any breach or violation of any contract made for the purposes set out in the foregoing sections a restraining order and writ of injunction may be issued by proper officer as prescribed in the Civil Code of Practice."

(*b*) For any breach of any such contract "the injured party may recover the damages sustained by him by reason of such violation of such contract of the person violating the same, and also of any person who shall induce or persuade another to violate such contract," including reasonable expense and attorneys' fees.

(*c*) The pooling agent "shall have the sole right to sell said crop so pooled or combined, and it shall be unlawful for any owner of such crop to sell or dispose of same and for any person to knowingly purchase the same without the written consent of such agent, and upon conviction thereof he or they shall be fined * * * not exceeding $250 for each offense."

Section 2 was an emergency clause as follows:

"Whereas *many crops of tobacco* and other products have been combined and pooled in this state, under contract and agreement entered into for the purposes set out in the above section, an emergency

is now declared to exist, which requires that this act should and it shall take effect from and after its passage and approval by the Governor." (Kentucky Acts 1908, Chap. 8, p. 38.)

The purpose of the legislature in passing the Act of 1906 and the Amendment of 1908 was stated by the court in *Commonwealth* v. *Hodges,* 137 Ky., 233; 125 S. W., 689, 693.

In that case a *purchaser* of pooled tobacco was indicted for violating the Act of 1908, and the lower court sustained a demurrer to the indictment. The Court of Appeals reversed the judgment, held the Amendment of 1908 constitutional, and described the purpose of the amended pooling law as follows (p. 693):

> "**The conditions which gave rise to the act are known of all men. At the time of its enactment there was but one buyer for the farmers' tobacco.** It mattered not how hard he labored, how valuable his soil, or how fine the quality of the crop he raised, he was obliged to accept whatever that buyer might offer. Indeed in many instances the buyer absolutely refused even to examine his crop, or to make any offer at all. Instead of the plenty to which he was accustomed, and to which he was entitled, he stood face to face with privation and want. As individuals the farmers were unable to cope with the situation. The General Assembly of the State of Kentcky, perceiving the straits to which the farmers were reduced by reason of the fact that the market for their products had been destroyed, and that their very livelihood—not to say comfort and prosperity—depended, not upon the market value of the products which they raised, but the caprice of one buyer, who gave, not what the articles were reasonably worth, but only that which he cared to give, deemed it wise to enact the law of 1906, authorizing the farmers to pool their products and select an agent to make the sales. Thus it will be seen that the party who sells pooled products without the written consent of the agent to whom it is pooled is not

guilty simply of violating his own contract. *Manifestly those who go into such a pool do so for the purpose of having the pool effective. It would not be effective if only one, two, three or four should enter into the combination.* Each man who enters the pool goes into it upon the assurance of the good faith of the others. When a party enters the pool, good faith requires that he shall keep his contract. If he fails to keep his contract, his act is one of bad faith towards the other poolers. * * * Having deemed the matter of pooling of sufficient importance to justify the enactment of a law authorizing it to be done, we cannot say that the legislature exceeded its power when it made the unlawful sale of pooled products a misdemeanor."

The opinions in the three cases now on review add little to what had been before determined, though they go, perhaps, into more elaborate detail as to the elements in determining "real value;" and they all present, in addition to the question of constitutionality under the Fourteenth Amendment, which arises upon the face of this legislation as revised and amended by the Court of Appeals, this further aspect of that question:

In the Bullitt County case—No. 276 here,— (*Harvester Company* v. *Commonwealth,* 147 Ky., 564; 144 S. W., 1064), the Harvester Company asked the court to instruct the jury that, in determining the "real value" of the machines sold by it, the jury should consider the evidence of the improvements in design and materials which had been made in the machines if they believed, from the evidence, such improvements enhanced their "real value." The court below refused to give this instruction but gave an instruction of its own: that they should find for the defendant if they believed the increased price was due "*solely*" to increased cost of labor or materials used in the construction of the machines. The Court of Appeals held there was no error

in the lower court's action. We will later state more fully the reasons given by the court and the pertinency of that ruling upon the Federal questions here involved.

In the Grayson County case,—No. 291 here,— (*I. H. Co. of A.* v. *Commonwealth*, 148 Ky., 572; 147 S. W., 1199),—the record was the same and the opinion in the Bullitt County case was adopted.

In the Todd County case,—No. 292 here,—(147 Ky., 795; 146 S. W., 12),—the same question arose, and the Court of Appeals held that evidence of the cost of putting an article on the market and selling it was relevant; that cost of sale, as well as the cost of manufacture, must be taken into consideration.

We have made this extended review of the anti-trust legislation of Kentucky and of the decisions of its Court of Appeals thereon, in order that this Court may have a general view of the course of legislation and of judicial decisions, to aid it in determining the merits of plaintiff in error's contention in the instant cases.

To sum up the matter briefly, it may be fairly stated that, according to the opinions of the Court of Appeals of Kentucky, it is now the law in that state that no combination is unlawful in and of itself; that neither individuals nor corporations can be punished for entering into a combination to fix prices or limit output; that the entering into a combination by an individual or a corporation is an element in an offense which is committed if and when such combination shall sell its product or commodity at a price greater or less than its "real value;" and that it is for a jury to determine, under the rules laid down by the Court of Appeals.

THE FACTS.

In No. 276, Bullitt County case, the petition charged that defendant, in 1902, had entered into a combination with sundry other companies manufacturing harvesting machinery, and that, within one year prior to the bringing of this penal action, had sold its "reapers, mowers, rakes, binders, and repairs" in Bullitt County, Kentucky, at a price greater than their "real value."

The Harvester Company's demurrer having been overruled (Tr., 3), the case proceeded to trial on its plea of not guilty. Defendant's motions, at the conclusion of the plaintiff's evidence and at the conclusion of the entire evidence, for a peremptory instruction were overruled. A verdict was rendered against the company, its motion for a new trial was overruled, judgment was entered, and an appeal prosecuted to the Court of Appeals, where the judgment was affirmed.

This writ of error was then taken to this Court on the ground that the anti-trust statutes of Kentucky, as construed and enforced, took defendant's property without due process of law, and denied to defendant the equal protection of the laws, contrary to the Fourteenth Amendment to the Federal Constitution.

On the trial before the jury there was evidence tending to show:

That defendant—plaintiff in error here—sold harvesting machinery manufactured by another corporation, the International Harvester Company, which, about the year 1902, was formed by a consolidation of five companies then manufacturing harvesting machinery, and that it afterward bought out another such company, and that thereafter it manufactured machines of the various patterns and brands theretofore made by the six companies;

That defendant sold all of the International Har-

vester Company's products, and, among others, made certain sales of harvesting machinery in Bullitt County within the time set forth in the petition;

That, between 1902 and 1910, defendant had raised the price of mowers, binders and rakes three times, and, on one occasion in 1909, had lowered the price of binders, and that the sales alleged in Bullitt County were at prices higher than those charged for like machines prior to the formation of the International Harvester Company in 1902;

That, between 1902 and the making of these Bullitt County sales, the cost of making the machines had increased, due to the increased cost of materials and labor—(As to some of the materials there was evidence *contra.*)

That the cost of selling these machines in Kentucky had been reduced as fewer persons were employed by defendant than had been employed there by the six companies before the consolidation;

That the machines in question were sold in a competitive market in which similar harvesting machines made by the Acme Harvester Company, Walter A. Wood Company and Johnston Harvester Company were being sold; and besides these the John Deere Company, the Thomas Manufacturing Company and the Emerson Company sold their mowers there. (Tr., 43, 44, 54, 55, 63);

(There was no evidence that the prices at which plaintiff in error's machines were sold were not fixed by this competition rather than by the alleged combination.)

That improvements had been made in the machines, both in design and materials, so that they were of greater value than the similar machines made prior to 1902. (There was evidence contradictory to this.)

The trial court, of its own motion, gave to the jury the following instruction (Tr., 25, 26):

"No. 2. Although you may believe from the evidence to the exclusion of a reasonable doubt that the defendant entered into or became a member of a pool, trust, or combine, as set out in instruction

No. 1, and that in twelve months before July 21st, 1911, the defendant, while a member of such pool, trust, or combine sold some of the farming or harvesting implements or machinery mentioned in instruction No. 1, in Bullitt County, either itself or through its agents at a greater price than said machinery sold at before defendant became a member of such pool, trust, or combine, yet, if you believe from the evidence that *the enhancement of the price* of said machinery *was due solely* to the increased cost of labor or material, if any, in producing said machinery, you should find the defendant not guilty."

The company asked the court to give the following instruction, but it was refused (Tr., 26):

> "In determining the real value of the machines sold by the defendant the jury should consider the improved conditions of the machines if they believe from the evidence such improvements enhanced *its* (their) real value."

In the Grayson County case, No. 292, the record is the same.

In the Todd County case, No. 293, the issues, evidence and instructions were substantially the same: There was less evidence as to the improvement of the machines but no evidence *contra;* and the evidence as to the increased cost of labor and materials was but slightly contradicted.

Therefore, in these three cases, the Kentucky Court of Appeals has held that it was lawful in Kentucky for plaintiff in error to enter into a combination for the purpose of enhancing the price of its commodities; but that if, having entered into a combination, its commodities sold in Kentucky at a price greater than that at which similar merchandise was sold before the combination was formed, and no substantial changes in market conditions were shown, this would sustain a finding

of guilt for selling the articles above their "real value,"—unless the cost thereof had been in the meantime increased *solely* by an increase in the cost of materials or labor.

We have, therefore the case of visiting a penalty upon a defendant for the simple act of selling an article at a price higher than a similar article commanded eight years prior to the sale in controversy, even though the machine presently sold is different from and better than the machine formerly sold.

All reference to the transcript in this Brief are (unless otherwise stated) to the Bullitt County record, No. 276.

ERRORS RELIED ON.

The anti-trust statutes of Kentucky, as construed and enforced in each of the instant cases, violate the Fourteenth Amendment of the Federal Constitution, for the following reasons:

1. The construction put upon the anti-trust laws by the trial court, in limiting the defense for increasing prices, *solely* to the increased labor and material costs, and eliminating the effect of improvements upon the "real value" of the machines, deprived defendant of property without the due process and the equal protection of the laws guaranteed by the Fourteenth Amendment;

2. The anti-trust statutes, as construed and enforced, do not sufficiently define the offense;

3. The anti-trust statutes, as construed and enforced in each of these cases, provide or establish different standards and different offenses for the pooling of their products by farmers and the combining of manufactured articles by manufacturers or dealers, and thus deprive plaintiff in error of the equal protection of the laws.

BRIEF OF THE ARGUMENT.

I.

The construction placed upon the Kentucky Anti-trust Statutes by the instructions of the lower court, approved by the Court of Appeals, renders those acts invalid as denying due process and equal protection of the law.

The instructions limited the jury, in determining whether or not the increase over the 1902 price was justified, solely to the increased cost of labor and material used in producing the machines, when there was evidence that the machines had been greatly improved.

Instruction 2 (Tr., 25, 26).

To hold as the decision does that a merchant cannot take into consideration the superior quality of his goods, in fixing their price, not only deprives him of all freedom of contract, but denies him equal protection.

Cotting v. *Kansas City Stock Yards Co.*, 183 U. S., 79, 94, 104.

This question was properly saved under the Kentucky practice.

Louisville, Henderson and St. L. Ry. Co. v. *Roberts*, 144 Ky., 820, 824; 139 S. W., 1073.

II.

The anti-trust law, as created and enforced by the Kentucky Court of Appeals, is too indefinite to constitute a penal offense, and the judgments against plaintiff in error are a denial to it of "due process."

The statutory and constitutional provisions which un-

der the construction of the Kentucky Court of Appeals comprise the anti-trust law of the state are as follows:

1. ACT OF MAY 20, 1890.

(Sections 3915 and 3917 Carroll's Kentucky Statutes).

"Sec. 3915. That if any corporation under the laws of Kentucky, or under the laws of any other state or country, for transacting or conducting any kind of business in this state, or any partnership, company, firm or individual, or other association of persons, shall create, establish, organize or enter into, or become a member of, or a party to, or in any way interested in any pool, trust, combine, agreement, confederation or understanding with any other corporation, partnership, individual or person, or association of persons, for the purpose of regulating or controlling or fixing the price of any merchandise, manufactured article, or property of any kind, or shall enter into, become a member of, or party to, or in any way interested in any pool, agreement, contract, understanding, combination or confederation, having for its object, the fixing, or in any way limiting the amount or quantity of any article of property, commodity or merchandise to be produced or manufactured, mined, bought or sold, shall be deemed guilty of the crime of conspiracy, and punished therefor as provided in the subsequent sections of this act."

"Sec. 3917. If any corporation, company, firm, partnership or person, or association of persons, shall, by court of competent jurisdiction, be found guilty of any violation of any of the provisions of this act, such guilty party shall be punished by a fine of not less than five hundred dollars and not more than five thousand dollars. Any president, manager, director or other officer or agent, or receiver of any corporation, company, firm, partnership, or any corporation, company, firm or association, or member of any corporation, firm or association, or any member of any company, firm or other association, or any individual, found by a court of competent jurisdiction, guilty of any violation of

this act shall be punished by a fine of not less than five hundred dollars nor more than five thousand dollars or may be imprisoned in the county jail not less than six months nor more than twelve months, or may be both so fined and imprisoned in the discretion of the court or jury trying the case."

2. SECTION 198—KENTUCKY CONSTITUTION—SEPTEMBER 28, 1891.

"Sec. 198. *Trusts and Combinations to be Suppressed.* It shall be the duty of the General Assembly from time to time, as necessity may require, to enact such laws as may be necessary to prevent all trusts, pools, combinations or other organizations, from combining to depreciate below its real value any article, or to enhance the cost of any article above its real value." (Carroll's Ky. Stat., p. 145.)

3. ACT OF MARCH 21, 1906.

(Kentucky Acts 1906, Chap. 117, p. 429, Carroll's K. S., Sec. 3941a.)

"An Act permitting persons to combine or pool their crops of wheat, tobacco and other products and sell same as a whole, and making contracts in pursuance thereof valid.

Sec. 1. It is hereby declared lawful for any number of persons to combine, unite or pool, any or all of the crops of wheat, tobacco, corn, oats, hay, or other farm products raised by them, for the purpose of classifying, grading, storing, holding, selling or disposing of same, either in parcels or as a whole, in order or for the purpose of obtaining a greater or higher price therefor than they might or could obtain or receive by selling said crops separately or individually.

Sec. 2. That contracts or agreements made or entered into by persons with each other, the object or intent of which is to unite, pool or combine all or any of the crops of tobacco, wheat, corn, oats, hay, or other farm products, raised by such persons, for the purpose of classifying, grading, storing, holding,

selling or disposing of said crops, or any of them, either in parts or as a whole, in order, or for the purpose of obtaining a better or higher price therefor than could or might be obtained by selling said crops separately or individually, are hereby permitted, and shall not, because of any such combination or purpose of said persons, be declared illegal or invalid.

Sec. 3. Such persons so entering into such agreement or contract as is set out in the foregoing sections, are hereby permitted to select an agent or agents through or by or with whom said parties so entering into such agreements may classify, grade, store, hold, sell or dispose of said crops, or any of them, and said agent or agents shall have the right to take, receive, hold, store, classify, grade, sell or dispose of said crops so placed in such agreement, as directed or authorized by their principal, for the purpose of accomplishing the object of such combination or agreement between such principals, and contracts and agreements entered into by such agent or agents for the purpose of classifying, grading, storing, holding, selling or disposing of said crop so combined, united or pooled, either in parcels or as a whole, are hereby permitted, and shall not, because of any such combination or purpose of such original agreement of such principals so entering into said combination, or of such agent or agents, be declared illegal or invalid.

Sec. 4. Whereas, many persons of this Commonwealth now desires to combine their respective crops of tobacco, wheat, corn, oats, hay and other farm products, an emergency is now declared to exist which requires that this act should, and it shall, take effect from and after its passage and approval by the Governor."

4. ACT OF MARCH 13, 1908.

(Kentucky Acts 1908, Chap. 8, p. 38, K. S., Sec., 3941a.)

"An Act to amend Section 3 of an act of the General Assembly of Commonwealth of Kentucky, approved March 21, 1906.

Sec. 1. That section 3 of an act entitled, An act permitting persons to combine or pool their crops of wheat, tobacco and other products and sell same as a whole, and making contracts in pursuance thereof valid, approved March 21, 1906, being Chapter 117 of the acts of the General Assembly of the Commonwealth of Kentucky for the year 1906, be and the same is hereby amended and re-enacted so as to read as follows (quoting said Act and then adding the following):

All contracts heretofore made by any person or persons for the purposes set out in the foregoing sections are hereby declared valid, if otherwise legally binding on the parties. To prevent any breach or violation of any contract made for the purposes set out in the foregoing sections a restraining order and writ of injunction may be issued by proper officer, as prescribed in the Civil Code of Practice.

For any breach or violation of any contract entered into for the purposes set out in the foregoing sections, the injured party may recover the damages sustained by him by reason of such violation of such contract of the person violating the same, and also of any person who shall induce or persuade another to violate such contract, which damages shall include the reasonable expense and attorney's fees incurred by the injured party in prosecuting an action to recover such damages, or to prevent a violation of such contract, if the party complaining shall succeed in doing so, which may be recovered in the same action or original proceeding. Said agent when so selected as herein provided shall have the sole right to sell said crop so pooled or combined, and it shall be unlawful for any owner of such crop to sell or dispose of same and for any person to knowingly purchase the same without the written consent of such agent, and upon conviction thereof he or they shall be fined in any sum or amount not exceeding $250.00 for each offense, to be fixed by the jury in their discretion.

Sec. 2. Whereas, many crops of tobacco and other products have been combined and pooled in this

> State, under contract and agreement entered into for the purposes set out in the above section, an emergency is now declared to exist, which requires that this act should and it shall take effect from and after its passage and approval by the Governor."

In

Burley Tobacco Society v. *Brumback* (1908), 128 Ky., 137; 107 S. W., 710, 712, and

Commonwealth v. *I. H. Co. of A.* (1909), 131 Ky., 551; 115 S. W., 703, 710,

the Court of Appeals held that the constitutional provision (Sec. 198) and the first two acts were to be construed together, and the Act of 1906 was in effect an amendment of the Act of 1890; that under each the offense consisted in continuing to fix prices or to sell goods *above or below their real value.*

The anti-trust law was thus rendered too obscure and indefinite for a penal statute.

U. S. v. *Sharp,* Peters C. C. R., 118.

U. S. v. *Brewer,* 139 U. S., 278, 288.

Dissenting opinion in

Commonwealth v. *I. H. Co. of A.*, 131 Ky., 551; 115 S. W., 703, 714, and cases there cited.

The indefiniteness and obscurity of the law were emphasized by the later Kentucky decisions.

I. H. Co. of A. v. *Commonwealth* (1910), 137 Ky., 668; 126 S. W., 352-354.

I. H. Co. of A. v. *Commonwealth* (1911), 144 Ky., 403, 138 S. W., 248, 252.

These cases make the standard by which the jury must determine guilt or innocence—what the market value would have been had no combination been formed. This

reduces the whole question to pure speculation, as to a matter not susceptible of proof or ascertainment.

The opinion in

Nash v. *U. S.*, 229 U. S., 373, 377.

does not conflict with this contention.

III.

Kentucky anti-trust statutes as construed and enforced herein deny the equal protection of the laws contrary to the 14th Amendment to the United States Constitution.

The history of Kentucky anti-trust legislation shows a clearly expressed intention to legalize the pooling of agricultural products, and to prohibit all other combinations.

The Acts themselves, on their face, show this is true:

Act of 1890—Sections 3915 and 3917 Ky. Stats.
Act of 1906—Ky. Acts of 1906, Chap. 117, p. 429.
Act of 1908—Ky. Acts of 1908, Chap. 8, p. 38.

The Act of 1890 was held not to be limited by Sec. 198 of the Kentucky Constitution.

Commonwealth v. *Grinstead* (1900), 108 Ky., 59; 55 S. W., 720, 722.

Commonwealth v. *Bavarian Brewing Co.* (1902), 112 Ky., 968; 66 S. W., 1016.

The sole purpose of the Act of 1906 was to legalize all contracts for pooling farm products.

Owen County Burley Tobacco Society v. *Brumback* (1908), 128 Ky., 137; 107 S. W., 710, 712.

The Act of 1908 aided and emphasized the purpose of the Act of 1906, by making it a misdemeanor for breaking, or inducing another to break, such pooling con-

tract. It was held, however, to apply only to pools of farm products.

O'Bannion v. *Commonwealth* (Ky., 1908), 113 S. W., 907, 908.

Commonwealth v. *Hodges* (1910), 137 Ky., 233; 125 S. W., 689, 690.

Collins v. *Commonwealth*, 141 Ky., 565; 133 S. W., 233.

Malone v. *Commonwealth*, 141 Ky., 570; 133 S. W., 235.

The character and explanation of this class of legislation are common knowledge.

Census 1910, Vol. II, p. 702; Vol. VI, pp. 606-8, 617; Vol. IX, pp. 391, 392.

Encyclopaedia Britannica, 11th Ed., Vol. 15, p. 741c.

Robinson v. *Van Hooser*, 196 Fed., 620, 621.

Steers v. *United States*, 192 Fed., 1, 3, 6.

The forced construction given to the statutes in

Commonwealth v. *I. H. Co. of A.* (1909), 131 Ky., 551; 115 S. W., 703, 706, 710,

does not cure the vital defect.

Even as construed, the law denies equal protection, because, in the case of farmers, the combination is judicially presumed not to seek an enhancement of price above the real value.

Tobacco Society v. *Brumback*, 128 Ky., 137; 107 S. W., 710, 715.

Commonwealth v. *Hodges*, 137 Ky., 233; 125 S. W., 689, 694.

Collins v. *Commonwealth*, 141 Ky., 565; 133 S. W., 233.

Malone v. *Commonwealth,* 141 Ky., 570; 133 S. W., 235.

Whereas in the case of manufacturers and dealers, including plaintiff in error, the legal presumption indulged was that any increase in price following a combination is an increase above the real value.

I. H. Co. of A. v. *Commonwealth* (1910), 137 Ky., 668, 677.

I. H. Co. of A. v. *Commonwealth* (1911), 144 Ky., 403, 410.

I. H. Co. of A. v. *Commonwealth* (1912), 147 Ky., 564 (Tr., 164, 165).

The statutes, as construed and enforced, furnish a double standard, and deny the equal protection of the law. No combination among farmers has been prosecuted, though their many pools have doubled or trebled the price of tobacco, while the advance in the prices of the different machines sold by plaintiff in error has amounted only to from 5 to 15 per cent. The Fourteenth Amendment, against denial of the equal protection of the laws, applies to all agencies of the state: it forbids discrimination, not only in the law itself, but in its unequal enforcement.

Henderson v. *Mayor,* 92 U. S., 259, 268,
Ex parte Virginia, 100 U. S., 339, 346.
Yick Wo v. *Hopkins,* 118 U. S., 356.

As construed and enforced, the Kentucky anti-trust law falls within the scope of

Connolly v. *Union Sewer Pipe Co.,* 184 U. S., 540, 560,

and within the reasoning of the opinion in

Cotting v. *Kansas City Stock Yards Co.,* 183 U. S., 79, 104, 105, 112.

A court cannot by judicial legislation save a statute clearly unconstitutional upon its face. The statute itself must preserve the fundamental, constitutional rights of parties. They cannot be left to the discretion of courts.

Louisville & Nashville R. R. Co. v. *Stock Yards Co.*, 212 U. S., 133, 143, 144.

ARGUMENT.

I.

The instructions of the lower court upon the issue of prices being above the "real value," placed a construction upon the Kentucky anti-trust laws which denied to plaintiff in error due process of law and the equal protection of the law.

Under the anti-trust statutes of Kentucky, as construed, it was entirely lawful for any persons or corporations in Kentucky to enter into a combination for the purpose of increasing the price of the commodities which they made, produced or sold. It was also lawful for any person, in the absence of combination or conspiracy or pool, to increase the price of any commodity without limit. But the members of any pool or combination were forbidden to carry the purpose of increasing the price to a point beyond the "real value" of the article, and that "real value," the court had held, was what the market value would have been under normal conditions. If the price of the article before the combination was a normal one, or the conditions of the market were normal, and the conditions of the market after the combination at the time in question were normal, and the price at the latter time was greater than at the former, the increase was presumed to be an increase above the "real value" unless it was shown to be due to other causes.

Without stopping to comment upon the necessary effect upon market conditions of a combination authorized by law to increase prices, let us examine how these rules were applied in the instant cases.

As to conditions in 1902 before the consolidation of certain harvester companies took place and at the time of the alleged offense, the Commonwealth introduced evidence that, at the earlier period, conditions were competitive in those counties, and there was nothing exceptional; and that similar conditions prevailed at the later time, there still being competition in the sale of binders, mowers, etc., by the Acme, Johnston, Deere and Wood companies, except that the competition between the makers of the particular brands of machines plaintiff in error has been selling ceased in 1902; that, at the later period, prices had increased from 5 to 15 per cent. in the aggregate, the increases occurring at different times. There was evidence on behalf of the defendant that the cost of labor employed in making the machines had increased 27.1 per cent. (Tr., 126) and the cost of materials used had increased; lumber-pole stock, 23 per cent.; hardwood, 33 per cent.; crating lumber, 11 per cent.; steel used in the machines, 22 per cent.; pig iron, 14 per cent.; cotton duck, 38 per cent. (Tr., 18); and the average advance was 25 per cent.; that the machines in design, construction and materials, and in efficiency, had been largely improved, and were more valuable on that account. There was some evidence that the machines had not been materially improved, and that the cost of some materials was no higher at the latter time than in 1902. There was undisputed evidence that the prices of agricultural implements other than those in question, and of farm products, and of commodities generally had increased in price as much or more than the increase in binders, mowers and rakes in question.

Upon such an issue—which is certainly without a parallel outside of the State of Kentucky,—it was not only important, but essential, that the jury—necessarily made

up mainly of farmers and purchasers of manufactured products—should be fairly and accurately instructed upon this extraordinary anti-trust, pro-pooling law. Although the evidence that the value of the machines had been increased by improvements, and that this increase in value was as great as the increase in price, and the evidence as to the increased cost of labor and materials, was before the jury, the trial court, of its own motion, gave this instruction:

> "Although you may believe from the evidence to the exclusion of a reasonable doubt that the defendant entered into or became a member of a pool, trust, or combine, * * * and that in twelve months before July 21st, 1911, the defendant, while a member of such pool, trust, or combine sold some of the farming or harvesting implements or machinery mentioned in instruction No. 1, in Bullitt County, either itself or through its agents at a greater price than said machinery sold at before defendant became a member of such pool, trust, or combine, yet, if you believe from the evidence that the enhancement of the price of said machinery was due *solely* to the increased cost of labor or material, if any, in producing said machinery, you should find the defendant not guilty." (Tr., 25, 26.)

The defendant asked the court to give the following instruction:

> "In determining the real value of the machines sold by the defendant, the jury should consider the improved conditions of the machines if they believe, from the evidence, such improvements enhanced its (their) real value." (Tr., 26.)

And the court refused the instruction.

Thus, under the instructions of the court, under this ambiguous, indefinite and court-made law, the jury were instructed that entrance into a legal combination, followed by a sale of an article at an increased price, warranted a finding of guilt unless the jury believed that the in-

creased price *was due solely* to the increased cost of the labor or material used in producing the article in question. And this, though there was evidence warranting the jury in finding that the increased price was not due in any way to the combination.

When this point was urged in the Court of Appeals, it was answered thus (Tr., 167):

> "Some of appellant's witnesses did testify as to the increased efficiency of the machines growing out of improved construction from the use of modern inventions and better material, whereby the necessity for and expense of repairing them is lessened to appellant and purchasers of the machines, but to what extent, if at all, this should add to the price of the machine was not made clear. * * *
>
> Several witnesses introduced for the Commonwealth testified that they owned and were familiar with such machines, and that those sold by appellant since the combination was effected were not more efficient than they were before.
>
> It was also in evidence that when first invented, such machines were much less efficient than now, and far more costly; and that new inventions, better material and better workmanship have brought them to their present high state of efficiency. It is, however, equally true that, along with their increase in efficiency, there has been a corresponding decrease in the price of the machines, and they can now be purchased at less than half their original price. *So, in view of these facts, there is room to doubt whether proof of the increased efficiency of the machines should have had any weight with the jury in determining whether the increase in the price was proper.*"

The court ignores the restrictions, in the instruction given, to the elements of labor and materials, which took away from the consideration of the jury all other elements affecting the "real value" of the machines, and considered only the refused instruction quoted above.

> "We do not think the refusal of this instruction was error. The instruction was improper as it sin-

> gled out and gave undue prominence to only one of the several matters relied on by appellant as justifying the increase in the price of its machines."

But the instruction given itself singled out one of those elements and excluded all the others. Even if the reason for refusal were sound, it would not excuse the error of the court in not correcting the instruction given or modifying the instruction offered, so that all the elements which were proper for the jury to consider would be stated in the instruction.

> *Louisville, Henderson & St. L. Ry. Co.* v. *Roberts*, 144 Ky., 820, 824; 139 S. W., 1073.

In the instant case there was no evidence that the prices, before the consolidation of certain harvesting machine companies was made, were fair and under normal conditions. The court assumes that as to manufactured products and assumes the contrary as to farm products; and states that the burden was upon appellant to show that such increase in prices "was due to the increased cost of material used, * * * the increased price of the labor employed, * * * or increase in the cost of putting them on the market." (Tr., 165.) Yet the instructions excluded all elements except increased labor and material costs. Not only this, but the Court of Appeals, in dealing with the increased cost of material and referring to the fact that 60 per cent. of the steel used in making the machines was acquired from the Wisconsin Steel Company, a subsidiary, said (Tr., 166):

> "What it costs appellant to manufacture, through the Wisconsin Steel Company, the steel furnished it by that company, does not appear from the evidence, but it is legitimate to *presume* that the steel thus obtained by it is secured at prices *greatly below* what it would have to pay if the steel were obtained from similar manufactories in which appellant owns no interest."

Therefore the inference is, that although plaintiff in error sold these machines in competition with similar ones made by the Acme, Johnston, Deere and Wood companies (Tr., 43, 44), and therefore, necessarily, at a price fixed by such competition, yet the price of its goods was above their "real value." The same prices, however, if made by any of its competitors who purchase all their iron and steel, would not be above the "real value" of the articles. Thus the "real value" of such articles so produced by two different companies would be different, though sold in the same market, at the same time and at the same prices.

Suppose we apply these rules to two combinations, which we will call two factories: One factory makes a better machine than the other, though the manufacturing cost is the same. The value of the two machines is obviously different, whether we regard the intrinsic value or the market value. Yet the Kentucky Court of Appeals holds that the greater efficiency of the machine cannot be considered in determining its "real value." Therefore, the factory that makes the better machine must, at its peril, sell it at the same price at which the less efficient machine is sold. But such a price, using words in their ordinary meaning, is less than its "real value" and, in an intelligent market, must be less than its market value.

The rulings of the Court of Appeals make the basing point the market price of the machines prior to the combination. And it is just as much an offense to sell an article below its real value as above it real value. Therefore, if plaintiff in error had reduced the price below what these machines sold for in 1902, it would have been as guilty as if it had increased the price at which they sold at that time, even though the reduced

prices were, under the conditions of supply, demand, material and labor costs, a fair price.

Therefore, if a combination, instead of improving its products, allowed them to deteriorate in value,—the costs of manufacture and distribution remaining the same —it could be convicted if it reduced the price of its products below what they had been before the combination. In other words, it would be guilty of a crime, if it charged less for an inferior product it made after the combination than for the superior one, that was made before the combination. For if, as was here held, improved quality is no justification for raising prices, neither can deteriorated quality justify lower prices.

This case is clearly within the reasoning of *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S., 79, 94, 104, where a statute, which declared all stock yards, which handled a specified amount of business daily, to be public, and fixed the prices for their services was held unconstitutional. Here, the Kentucky law attempts to fix prices of purely private companies and individuals, by prohibiting them from charging more for a superior than for an inferior article. In the *Stock Yards Case*, it was held that equal protection was denied, because the law fixed the charges of large stock yards, while allowing smaller stock yards to charge as they would. Here, equal protection is denied because improved articles are compelled to be sold at the same price as inferior and unimproved.

The law, as so construed, violates the Fourteenth Amendment. It deprives persons of the right to obtain compensation for improvements and superior quality in goods which their industry and intelligence created. This increment—improved quality—is property precisely as is

the money which goes into the manufacture and distribution of a product. The statute, thus construed, prohibits merchants from considering the improved quality of their goods in fixing their prices, and thus arbitrarily interferes with the freedom of contract, guaranteed by the due process clause of the Fourteenth Amendment.

The law as so construed also denies equal protection. It requires the manufacturers of a superior and improved article to sell at the same price as makers of an inferior and unimproved article, providing the cost of manufacture and distribution in each case be the same.

II.

The Kentucky anti-trust statutes, as construed by the Court of Appeals, are so indefinite as to render them void as criminal laws.

The gist of the offense under the Acts of 1890 and of 1906, construed as already stated, consisted, not in forming the combination to enhance prices, but in a member of a combination selling the article at a price above or below its "real value." This court-made statute creates a standard so indefinite that a conviction under it amounts to a deprivation of property "without due process of law."

> "Laws which create crimes ought to be so explicit in themselves or by reference to some other standard that all men subject to their penalties may know what acts it is their duty to avoid." (*U. S.* v. *Sharp*, Peter's C. C. R., 118.)

The foregoing statement by Mr. Justice WASHINGTON was approved by this court in *U. S.* v. *Brewer*, 139 U. S., 278, 288.

This fundamental rule is stated with great clearness in the dissenting opinion of Judge HOBSON in *Common-*

wealth v. *I. H. Co. of A.*, 131 Ky., 551; 115 S. W., 703, 714, as follows:

> "Under the rule now declared by the court, it will be a question for the jury in each case whether the combination raised the price above the real value of the article or lowered it below it. It will, therefore, be a question for the jury in each case what was the real value of the article. The people who make the combinations may suppose that the value which they fix is the real value, while one jury may come to one conclusion on the subject, and another to a different conclusion; so no man will be able to know whether he has violated the law until after he is tried. In *Ex parte McNulty*, 77 Cal., 164, 19 Pac., 237, 11 Am. St. Rep., 257, it was well said by the Supreme Court of California: 'Before one can be convicted of a crime, there must be some rule of action prescribing with some certainty and expressing intelligently the sovereign will.'"

The dissenting opinion then reviewed *L. & N. R. R. Co.* v. *Commonwealth*, 99 Ky., 136; 35 S. W., 130; *Tozer* v. *U. S.*, 52 Fed., 917; *Commonwealth* v. *L. & N. R. R. Co.*, (Kentucky), 46 S. W., 700, all holding that the nature of the criminal offense cannot depend upon the opinion of the jury—the law must define the crime. The dissenting opinion continues:

> "The soundness of these cases was recognized by this court in *Commonwealth* v. *Grinstead*, 108 Ky., 76, 55 S. W., 720, 57 S. W., 471, where, in answer to the argument that the legislature, in passing the very act in question, should have limited its provisions to combinations to raise prices above the real value of the article or to lower them below the real value, this court said: *'Had it done so, there is strong authority in this state for holding that such an enactment, imposing a penalty for a combination to depreciate below its real value any article, would be held void for uncertainty.'*
>
> The same principle was applied in *Matthews* v. *Murphey*, 63 S. W., 785, 23 Ky. Law Rep., 750, 54 L. R. A., 415, where the statute authorizing a physician's

certificate to be canceled for unprofessional conduct was held void. In the same way, in Jackson *Ex parte*, 45 Ark., 164, a statute was held void which punished any one who committed any act injurious to the public health or morals or the due administration of the laws. To the same effect are *Samuelson* v. *State*, 116 Tenn., 470, 95 S. W., 1017, 115 Am. St. Rep., 805, and *Cook* v. *State*, 26 Ind. App., 278, 59 N. E., 489.

The real value of a thing is much more indefinite than the expressions used in any of the acts referred to. It may mean the cost of production plus a reasonable profit and allowance for the amount of money invested. But what is a reasonable profit, or what allowance should be made for investment, are too indefinite to be made the subject of a crime, without any standard in advance by which the crime is to be determined. The expression by others might be taken to refer to the worth of the article to the consumer; that is, what can he make out of it, or what he could afford to give for it rather than to do without it. From this standpoint the expression is equally indefinite. From which standpoint a jury would look at the matter, and what they would consider a reasonable profit, would depend on the constitution of each jury. To say that the expression means the market value of the article when not affected by abnormal conditions is only to add to the confusion; for what are abnormal conditions, and who is to judge whether the conditions are abnormal? The market value of an article may be determined with some certainty, but what its market value will be under other conditions than those that exist, is speculation pure and simple.

To steal is an offense. Statutes grading the punishment of the offense according to the amount stolen are universally in force. The value of the article stolen, though, in such cases is always determined by its market value, a thing which can be fixed with reasonable certainty. To compare with this the speculation as to what the market value of a thing might be under different circumstances than those existing, is for the court to shut its eyes to the principle upon which the rule of law rests. Where

there is a question of market value or of ordinary care, it may be submitted to the jury in a civil or a criminal case, because there is no better standard that may be reasonably attained. But when you come to agreements raising or lowering the prices of products, it is very easy for the legislature to define to what extent such agreements shall be unlawful; for the legislature may specifically regulate the subject, and it should not leave the law so indefinite that men may not safely transact their business. No one should be convicted of crime upon the mere speculation of a jury, after the act is done. To illustrate, the farmers of Kentucky recently sold a large quantity of tobacco at $16 a hundred. Can they all be indicted and convicted under the statute by a jury of persons, who do not produce tobacco, upon proof that the tobacco was not really worth more than $12, and could be produced at a handsome profit at that price? Again, the Society of Equity took its rise in the West, where the farmers pooled their wheat, refusing to sell it for less than $1 a bushel. If the farmers of Kentucky should make a similar arrangement, and fix the price at $1.50 a bushel, could they all be convicted under the statute upon proof that the price of wheat in the market under normal conditions would be less than $1.50? To so hold is simply to refuse to enforce the plain legislative intent in enacting the statute of 1906, and to hold that the act of 1890 is to some extent in force as to farmers when the legislature expressly said it should not be in force as to them at all. The very purpose of all of these arrangements is to affect the market price. If they did not affect the market price, they would be useless. Under the rule laid down by the court, no one who enters into such an arrangement can now tell when he may safely go into the pool without violation of law."

The Kentucky Court of Appeals has illustrated the accuracy of the foregoing statements of the minority opinion, by the changes which it has itself made in subsequent cases, in construing the meaning and elements of the

"real value" of an article. It has prescribed, in different cases, inconsistent rules.

In the next case against plaintiff in error, in 1910,—*International Harvester Company of America* v. *Commonweath*, 137 Ky., 668, 126 S. W., 352, 354, 355,—the court, by Mr. Justice O'Rear, undertook to answer the above minority opinion by saying that the market value is the "real value;" but this rule, even in that case, was not adhered to. The court said (p. 354):

> "The gist of the offense denounced by our statutes against pooling is that the purpose of the pool is to enhance the value of the article pooled above its real value. Where the design of the poolers is to enhance the value of their product or where, whatever their design, such is the natural effect of their action, and such as was necessarily foreseen because of its obviousness, the offense is completed. * * *
>
> Under fair competition, and under normal conditions, *the market value of a commercial commodity is its real value. It is that value* that our legislation aimed to preserve. That value will increase or diminish according to the fluctuations of the market values of its ingredients, or of the price of labor which produces it; or by improved and cheaper methods of production, or by cheaper means of transportation; or by the invention or discovery of other products which are or may be used in lieu of the particular one; or by the increase or decrease of sources of supply and demand. Must the prosecution by its evidence establish the existence or nonexistence of all the conditions naturally affecting market values of the article in question, before it can be said to have sustained its charge? * * *
>
> Where there are two or more producers of the same article, supplying the same market, without any understanding or agreement between them * * * competition may be said to be fair, * * * and **when there is an absence of such abnormalities as panics, widespread strikes, wars, and such, the conditions may be said to be normal.**"

The legislative action was not aimed to

prevent co-operation. It was aimed against monopoly. Therefore, *it is not enough,* under a prosecution under our statute, to show that there has been a combination among producers of their products or plants. Human nature is such that we must know the combination was intended to improve the affairs of those entering into it. *They expected to make more money out of it than they made before. That is the spur of all commerce, and it would be an unwise policy that took it away. Nor is it enough to show in addition, and no more, that prices of the commodity were subsequently advanced. It may have been that the prices before were not high enough, to pay the producers a living profit—though that is scarcely likely, else, save in exceptional callings, they would not have been engaged in the business where there was a choice left them to engage in some other.* It is necessary to show that the general conditions affecting the market of that commodity were normal, and that but for the combination complained of the competition would have been fair; that is, natural and usual. Then the burden would shift to the defense to show such exceptional conditions affecting the particular commodity *as naturally tended to produce the increase in market price* which the prosecution had proved; such, for example, as that the cost of labor, or of the ingredients or constituent parts, or of transportation, or any other particular matter peculiarly within the defendant's knowledge, which legitimately affected the selling price of the article as compared with its previous selling price."

The court, having stated the various elements as above, concluded:

(p. 356) "The evidence should have been admitted showing the increase in the costs of material and labor entering into this machinery; then the jury should have been instructed that, if the increase in price was due *solely* to the increase in cost of labor or material in producing the articles, the verdict should be for the defendant."

43

The law in brief is this:

It authorizes the formation of combinations and pools for the purpose of enhancing the prices of products, regardless of the then market conditions; but such a combination or pool being formed, if it raises prices, it must show that the market conditions at the time it was formed were abnormal or the prices abnormally low, or else be condemned for raising prices above the "real value."

The following year another case against plaintiff in error was before the Court of Appeals—*I. H. Co. of Am.* v. *Commonwealth*, 144 Ky., 403, 138 S. W., 248, 252, appeal from Logan County. The court, by CARROLL, J., said (p. 252):

> "So many factors enter into its solution that it is not easy to determine when the price of an article has been enhanced above its real value, as it is contended the price of machines was. The condition of the market, the character of the article, the use to which it is put, the demand for it, the price of labor and material, the cost of production, and the expense of sale, are some of the things that are to be considered in fixing the price. * * *
>
> But the fact that the combination was formed, in connection *with the legal presumption that it was formed for the purpose of fixing and controlling prices*, is sufficient to show in the absence of countervailing evidence that an advance in the price prevailing before the combination was entered into enhanced the price of the article above its real value, if market conditions before and after the advance were substantially the same, and the cost of production had not materially increased or in proportion to the advance * * *
>
> Under this rule, the commonwealth made out its *prima facie* case, but the unexplained and uncontradicted evidence of an advance in the price of labor and material entering into the construction of the machines rebutted the inference of guilt, and the

court should have directed a verdict for the defendant.

It will be remembered that it is as unlawful to depreciate prices below their "real value" as to enhance them above it. Therefore the position of a jobber of manufactured goods in Kentucky is this: He must, at his peril, fix his prices at the precise level, that a jury will find would have been their market value had there been no combination, or be guilty of a crime.

The principal elements which determine selling prices are:

(a) The extent of the demand compared with
(b) The extent of the supply.

Then come:

(c) The vigor or virulence of the competition;
(d) The cost of raw materials;
(e) The general range of wages;
(f) Cost of power, or power producing fuels, and transportation thereof to the plant;
(g) The cost of transportation from factory to market;
(h) The quality or efficiency of the goods.

Besides these are the items of taxes, insurance, interest and plant depreciation.

What the jury was required to do in the present case was to estimate, on Sept. 9, 1911, what the market price of harvesting machines would have been in Bullitt County, Ky., from July 21, 1910, to July 21, 1911, had the same character of competition which prevailed in 1902 continued until July, 1911. There was no evidence as to what that competition was. The proof is that since 1902 everything has advanced, and practically everything has advanced more than harvester goods.

But the evidence showed that while the former competition between the Deering, McCormick, Plano, Milwaukee and Champion companies had been merged in plaintiff

in error, competition then existed in that county between its goods and the machines made by the Acme, Johnston, Wood and other harvester companies. There was not the slightest evidence that the prices plaintiff in error charged for the goods were not fixed by this competition; there was not the slightest evidence, therefore, that the act of combination was the cause of the increase in prices.

Under the rulings, the jury started with the prices in 1902 and assumed that they represented the real value of the machines that year; they then assumed that the advance was caused by a combination; and they are then required to guess what the prices would have been had there been no combination; and upon that guess, guilt or innocence depended. The jury was compelled to guess how much or how little the *lessening* of competition caused by the consolidation of several competing harvester plants in 1902 tended to produce the prices existing in 1910 and 1911; or, in other words what the prices would have been in 1910 and 1911, had there been no consolidation in 1902. Or, since actual competition was proved to exist in 1910 and 1911, what the prices would have been in 1910 and 1911, had the competition then in force, been the same competition which had been in force in 1902.

Such legislation has all the vice of *ex post facto* laws. In principle there is no difference between convicting a man for an act he could not have known was illegal, and convicting him for an act which, when committed, was lawful.

Under these statutes a man might be convicted under the Anti-Trust Act of 1890 for joining a pool or combination to enhance the price of manufactured tobacco above its real value, and again convicted under the Pooling Act of 1906 for withdrawing from such pool, because

another jury might think that although the purpose of the pool was to enhance the price of manufactured tobacco yet the price that the poolers were endeavoring to advance it to, was not higher than its real value; that is, not higher than its market value would have been if there had been no abnormal conditions to increase its price.

A person's guilt or innocence is thus made to turn upon the existence of something that cannot be proved by evidence; namely, what would be the market value of certain commodities under other conditions than those that actually exist. This is something that cannot be known. Therefore, it is something that cannot be proved.

In the instant cases, how can it be known—how can it be proved—what binders, mowers and rakes would have sold for in Bullitt or Grayson or Todd counties, Kentucky, in 1911, if the International Harvester Company had not been organized?

It was obviously as impossible to prove what the market value of those machines would have been under other conditions as to prove what it will be five years hence.

Against this contention will doubtless be urged the opinion of this court in *Nash* v. *U. S.*, 229 U. S., 373, at p. 377, by Mr. Justice Holmes:

> "But apart from the common law as to restraint of trade thus taken up by the statute the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death. 'An act causing death may be murder, manslaughter, or misadventure according to the degree of danger attending it' by common experience in the circumstances known to the actor."

That opinion, as it clearly shows, was based not only

upon the well-defined meaning of unreasonable or undue restraint of trade at common law, but also on the fact that such an offense, like many others enumerated, necessarily depends upon degree for its criminality. This is not a matter of legislative or judicial choice, but it inheres in the nature of the social relations out of which such offenses spring. The indefiniteness arises out of the necessities of the case. In no other way than by degree can you mark the division between misadventure, gross negligence and some forms of manslaughter and murder.

But we are not dealing with any such situation here. The marts of trade have their own vocabulary, but "real value" is not in it. Everyone knows what actual cost, market value, and reasonable profit mean, although they have shades of variation, and two differing prices may both be fair and reasonable prices. But what is "real value" in trade? The court of appeals says that the real value is what the market value would be if the market conditions were different. But if a combination in harvesting machines is a material change in the normal market conditions, in precisely the same way and to precisely the same degree is a pooling of crops an abnormal influence on the market value of those crops. But to what extent the market value has been affected, either by the combination in manufacturing or by the pooling of crops, is incapable of knowledge or proof.

III.

The Kentucky anti-trust statutes, as construed and enforced herein, deny to plaintiff in error the equal protection of the law, contrary to the fourteenth amendment.

The introductory statement of this brief gives the history of the Kentucky anti-trust laws and the very ingenious and unique construction of them that the Kentucky Court of Appeals made to avoid the prohibition of the Fourteenth Amendment.

The facts very shortly stated are: The original anti-trust act of May 20, 1890 (Ky. Stats., Secs., 3915-3921), prohibited all pools, trusts, agreements, confederations or understandings for the purpose of regulating or controlling or fixing the price or limiting the quantity of any merchandise or article, under a penalty of not less than $500 nor more than $5,000 or imprisonment in jail for not less than six nor more than twelve months, or both. On September 28, 1891, Kentucky adopted a new constitution in which section 198 provided that:

> "It shall be the duty of the general assembly * * * to enact such laws as may be necessary to prevent all trusts, pools, combinations, or other organizations from combining to depreciate below its real value any article, or to enhance the cost of any article above its real value."

In 1900 the Court of Appeals held that this provision of the constitution did not limit the act of 1890, and that all pools, trusts and combinations to fix prices or limit quantity were prohibited. (*Commonwealth* v. *Grinstead*, 108 Ky., 59; 55 S. W., 720, 722; 57 S. W., 471; *Commonwealth* v. *Bavarian Brewing Co.* (1902), 112 Ky., 928; 66 S. W., 1016.)

On March 21, 1906, the Kentucky legislature passed an act declaring it lawful

> "for any number of persons to combine, unite or pool any or all of the crops of wheat, tobacco, corn, oats, hay or other farm products raised by them for the purpose of * * * selling or disposing of same * * * for the purpose of obtaining a greater or higher price therefor than they might or could obtain or receive by selling said crops separately;"

and that all contracts made for such purpose should not "because of any such combination or purpose" be illegal. Also, that pooling agents might be appointed, and contracts for that purpose should be valid. The act had an emergency clause reciting:

> "Whereas, many persons of this commonwealth now desire to combine their respective crops of tobacco, wheat, corn, oats, hay and other farm products, an emergency is now declared to exist," etc.

Under this act, in 1908, a tobacco grower was enjoined, at the prayer of the pool, from selling his tobacco at a price less than that fixed by the agent of the pool. (*Owen County Burley Tobacco Soc.* v. *Brumback* (1908), 128 Ky., 137; 107 S. W., 710, 712, 714.) In this case the court said (p. 714):

> "It is manifest that the *real, and in fact only, object* of the act was to enable the producers by pooling and combination *to obtain better prices than they could get if they sold their crops separately and as distinct individuals.*"

As Judge Hobson said, in the minority opinion (131 Ky., 551, 115 S. W., 703):

> "The very purpose of all of these arrangements is to affect the market price. If they did not affect the market price, they would be useless."

And the majority opinion recognized this fact:

> "It was conceived that, inasmuch as the most stringent laws did not effectually prevent unlawful

> combinations of capital and resources, it would have a tendency to counteract this evil to put it in the power of those against whom it was operating principally to protect themselves by combining their products, so that by classifying, grading, and handling them in large bulks *it would materially affect the general market of such commodities, and better prices would be realized.*"

On March 13, 1908, the Kentucky legislature amended the act of March 21, 1906, by expressly providing that a breach of any pooling contract might be restrained by injunction, and that for a breach an injured party might recover damages both from the member of the pool violating his contract and also from any person inducing such violation—including reasonable expenses and attorney's fees. The amendment further provided that the pooling agent should have the sole right to sell the pooled crop, and that it should be a misdemeanor punishable by a fine not exceeding $250 for each offense for any owner of such pooled crop to sell the same, or for any person knowingly to purchase the same "without the written consent of such agent." (Ky. Stats., Sec. 3941a.) This amendment was also passed with an emergency clause:

> "Whereas many crops of tobacco and other products have been combined and pooled in this state under contract and agreement entered into for the purposes set out in the above section an emergency is now declared to exist," etc.

And in the same year, a tobacco grower who had pooled his crop and then sold it without the consent of the pooling agent, was indicted and convicted. The law was sustained by the Court of Appeals. (*O'Bannion* v. *Commonwealth* (1908), 113 S. W., 907, 908.)

While the original Pooling Act of 1906 specifies the crops as "wheat, tobacco, corn, oats and hay," and the Court of Appeals in the *Brumback* case (*supra*) refers to the Act

as applying to farm products generally, the emergency provision of the Act of 1908 specifically names only tobacco, which, as every one knows, was the sole crop to secure the pooling of which both Acts were passed.

In *Commonwealth* v. *Hodges* (1910), 137 Ky., 233; 125 S. W., 689, 693, a *purchaser* of pooled tobacco was indicted; and the lower court sustained a demurrer to the indictment. The Court of Appeals reversed the judgment, and held the Act of 1908 constitutional, and described its purpose as follows:

> "*The conditions which gave rise to the act are known of all men. At the time of its enactment there was but one buyer for the farmers' tobacco.* It mattered not how hard he labored, how valuable his soil, or how fine the quality of the crop he raised, he was obliged to accept whatever that buyer might offer. Indeed in many instances the buyer absolutely refused even to examine his crop, or to make any offer at all. Instead of the plenty to which he was accustomed, and to which he was entitled, he stood face to face with privation and want. As individuals the farmers were unable to cope with the situation. The General Assembly of the State of Kentucky, perceiving the straits to which the farmers were reduced by reason of the fact that the market for their products had been destroyed, and that their very livelihood—not to say comfort and prosperity—depended, not upon the market value of the products which they raised, but the caprice of one buyer, who gave, not what the articles were reasonably worth, but only that which he cared to give, deemed it wise to enact the law of 1906, authorizing the farmers to pool their products and select an agent to make the sales. Thus it will be seen that the party who sells pooled products without the written consent of the agent to whom it is pooled is not guilty simply of violating his own contract. Manifestly those who go into such a pool do so for the purpose of having the pool effective. It would not be effective if only one, two, three or four should enter into the combina-

> tion.* Each man who enters the pool goes into it upon the assurance of the good faith of the others. When a party enters the pool, good faith requires that he shall keep his contract. If he fails to keep his contract, his act is one of bad faith towards the other poolers. * * * Having deemed the matter of pooling of sufficient importance to justify the enactment of a law authorizing it to be done, we cannot say that the legislature exceeded its power when it made the unlawful sale of pooled products a misdemeanor."

Though the court construed the Pooling Act of 1906 as amending the Anti-Trust Act of 1890, yet it held, in the *Hodges* case (*supra*), that the Act of 1908 amending the Pooling Act was not in any sense an amendment of the Anti-Trust Act of 1890. Hence, though under the construction given by the court, all persons may pool their products, yet it is only a misdemeanor to violate a pooling agreement as to farm products.

It will be seen from the above, that the purpose of the legislature was to allow combinations between raisers of agricultural products made for the purpose of enhancing prices of such products, and to prohibit like combinations made between any other persons. This is clear from the reading of the Act of March 21, 1906. There is nothing in that Act stating that it should apply to all persons or that the combination it authorizes should not raise the prices of its products above their real value. The Act is explicit and unambiguous and no room exists for construction. The natural effect of that Act, taken in con-

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*Though the Act of 1908 provided penalties for breaking pools, the legislature neglected to provide that it was criminal to refrain from joining such pools. How far the members of these "lawful combinations" would go in attempting to supply this omission of the General Assembly is shown by *Robinson* v. *Van Hooser*, 196 Fed., 620, 621. There the plaintiff's family was assaulted and he had to abandon a home where he had lived for 25 years—all because he refused to join a combination, sanctioned by the laws of 1906 and 1908, but, instead, insisted on selling his own products instead of having his tobacco sold and its price fixed by the pool. See, also, *Steers* v. *U. S.*, 192 Fed., 1, 3, 6.

nection with the Act of 1890, was to legalize the pooling of farm products and forbid all other combinations. This was, plainly and undoubtedly, the legislative intent. And this was its practical effect.*

The purpose of this legislation is apparent. Kentucky is essentially an agricultural state. 86 per cent. of its territory is farm land, worth $773,797,880, and divided into 259,185 farms (Census 1910, vol. 6, pp. 606, 607, 608), producing crops in 1909 of the total value of $138,973,107. (Ibid., p. 617.) The total value of all manufactures in 1909, deducting the cost of the raw materials, was $111,975,000; and if distilled and malt liquors, flour, tobacco and dairy products are deducted, the total manufacturing, exclusive of the value of the raw materials, was only $58,584,000. (Id., vol. 9, p. 392.)

The total population of Kentucky in 1909 was 2,289,905, of which the rural population—that is, those residing outside of cities of 2,500 or more,—was 1,734,463 (Id., vol. 2, p. 702), while only 79,060 persons were engaged in the manufacturing industry, of whom 5,050 were proprietors or members of manufacturing firms. (Id., vol. 9, pp. 391, 392.)

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*Hon. Augustus E. Willson, Governor of Kentucky, in his Message to the General Assembly, on Jan. 7, 1908, said:

"*We have severe laws against pooling, which it is claimed are ample to suppress and punish all combinations against the farmer, and we have a statute which makes it lawful for a farmer to pool and combine against the buyers, when it is unlawful for them to combine against the farmer.* Our Courts are in operation to protect the legal rights of all and punish infractions of the anti-trust laws. This great conflict of interests between the parties interested in millions of dollars worth of tobacco, has excited a great deal of hard feeling, angry controversy and personal threats of parties on either side against the other, and finally has broken out in large demonstrations of bands of men going through the country, taking the place of the government and depriving people of their Constitutional rights secured by law, to sell their own tobacco, which is their own property, and use it as they please, under threat of personal destruction, * * * so that the grossest violations of the law go unpunished and the people's liberties are destroyed, with little hope of redress until matters got so bad that the people conclude it will be better to lose all their tobacco and all their farms than lose their liberties.

KENTUCKY TOBACCO CROP AND THE "NIGHT-RIDERS."

In 1899 Kentucky led all the States both in acreage and yield of tobacco, having 384,805 acres, which was 34.9 per cent. of the total acreage in the United States.

In 1909 the tobacco acreage in Kentucky was 420,000, the crop was 350,700,000 pounds, valued at $37,174,200; and the average price per pound had increased from 5.9 cents in 1899 to 10.6 cents in 1909.

The two most important districts are the Black Patch in the extreme southwest corner, and the Blue Grass Region and the hill country in the south and east. The superior soil and larger crop in the Blue Grass Region enable a grower to produce a crop at 6.5 cents and he could use his land for tobacco once in four years; but this price would not pay expenses in the hill country where the work was greater and the land could be used for tobacco only once in six years. The Blue Grass production had sent the price of Burley tobacco down to this figure and below. This led the planters in the Black Patch to meet a combination of the buyers by forming a pool,—the Planters' Protective Association,—into which 40,000 growers were forced by "night-riding" and other forms of coercion and persuasion; and thus they had secured an advance to 11 cents a pound from the "regie" buyers and had shown the efficacy of pooling methods in securing better prices for the tobacco crop.

> "Following their example, the planters of the Burley formed the Burley Tobacco Society, a Burley pool, with headquarters at Winchester and associated with the American Society of Equity, which promoted in general the pooling of different crops throughout the country. The tobacco planters secured legislation favorable to the formation of crop

"In December, 1905, in Todd County, in the Circuit Court room, packed by excited men, a lawyer declared that if they did violate the law they ought not to be punished, and would not be prosecuted while he was Commonwealth's Attorney, a speech which created apprehension at the time, and the very next night, one tobacco factory in Trenton was burned and another set on fire, and the following Monday night a large band of masked and armed men held up the railroad train and searched it for tobacco men and then came on to Elkton and dynamited a snuff factory, and although the Circuit Court was in session, with a Grand Jury empaneled, no one was indicted or punished."

pools. The Burley Tobacco Society attempted to pool the entire crop and thus force the buyers of the American Tobacco Company of New Jersey (which usually bought more than three-fourths of the crop of Burley) to pay a much higher price for it. In 1906 and in 1907 the crop was very large; the pool sold its lower grades of the 1906 crop at 16 cents a pound to the American Tobacco Company and forced the independent buyers out of business; and the Burley Society decided in 1907 to grow no more tobacco until the 1906 and 1907 crops were sold, making the price high enough to pay for this period of idleness. Members of the pool had used force to bring planters into the pool; and now some tobacco growers, especially in the hills, planted new crops in the hope of immediate return, and a new 'night-riding' war was begun on them. Bands of masked men rode about the country both in the Black Patch and in the Burley, burning tobacco houses of the independent planters, scraping their newly-planted tobacco patches, demanding that planters join their organization or leave the country, and whipping or shooting the recalcitrants. * * *

"In November, 1908, the lawlessness subsided in the Burley after the agreement of the American Tobacco Company to purchase the remainder of the 1906 crop at a 'round' price of 20½ cents and a part of the 1907 crop at an average price of 17 cents, thus making it profitable to raise a full crop in 1909." (Encyclopaedia Britannica, 11th Ed., Vol. 15, p. 741c.)

Construction and Enforcement of the Conflicting Statutes.

These were the conditions which produced the Pooling Act and the situation which it was intended to meet. Without abating the prohibitions aimed at the tobacco buyers, the legislature intended to relax all restraints, all limitations upon the combination of tobacco producers. The situation made it advantageous to have a law which

allowed farmers to combine to raise the prices of their products and which prohibited all others from combining.

The problem presented to the Court of Appeals was to sustain just that legislation; to harmonize the Pooling Act of 1906, which expressly authorized the farmers to combine to raise the prices of their products, and the Anti-Trust Act of 1890, which made it a crime for any person to become a member of a pool organized for the purpose of controlling or fixing the price of property of any kind. The following decisions show how that problem was solved:

In *Commonwealth* v. *I. H. Co. of A.* (1909), 131 Ky., 551, 115 S. W., 703, the court stated the difficulty thus (p. 706):

> "In the first place, there is no denial that if the two statutes in question, when construed according to the canons of statutory construction, confer the right upon one class of citizens to do an act, which is made a criminal offense if done by any other class, it would contravene the fourteenth amendment to the federal Constitution."

Possibly a realization that its solution of the problem offended the canons of statutory construction led the court to say:

> "A state statute has such meaning as the judicial department of that state construes it to have. * * * This is so, even though, without such judicial construction, the federal courts might have, from the language of the statute, construed it differently."

The court then said that the Act of May 20, 1890, the Act of 1906, and Section 198, of the Constitution, should all be construed together in connection with the fourteenth amendment of the federal Constitution, and that so construed this would be the result (p. 710):

> "If, however, it be construed that the Act of 1906 operates to confer upon all persons the same bene-

fits, as was intimated in the opinion in *Owen County Burley Tobacco Society* v. *Brumback, supra,* then there is no discrimination. As that construction is possible under the language employed, and as it would sustain the validity of the act, it must be adopted. It therefore follows that appellee and all others have the right under the existing laws in Kentucky to pool their property, or combine their capital and other resources, so as to get no more than the real value of their property when sold in the market. * * * We say that both our statutes apply to the farmer as well as to others, and that both apply to others equally with farmers."

The remaining question was to fix a rule by which the "real value" might be determined by a jury. The Court of Appeals undertook to do this and has laid down one rule which governs cases where the complaint is that a farmer has broken a pooling agreement, and another rule where persons other than farmers are indicted for violation of the Kentucky Anti-Trust statute.

In *Tobacco Society* v. *Brumback,* 128 Ky., 137, 107 S. W., 710, the court said (p. 715):, in referring to the law of 1906:

> "It does not violate the constitution either of this state or of the United States; and as the record does not show that the plaintiff society is attempting to enhance the price of the tobacco pledged to it beyond its real value, the motion to dissolve the injunction must be overruled."

In other words, a pool formed for the express purpose of enhancing the price of farm products *would be presumed in the absence of evidence not to seek an enhancement above the real value.*

In *Commonwealth* v. *Hodges,* 137 Ky., 233, 125 S. W., 689, indictment against persons knowingly purchasing pooled tobacco, the court distinctly held (p. 694) that the amendment of 1908 referred *only to farmers and their products,* and not to any other combination. Then, if

one violates a farmers' pooling agreement he is guilty of a misdemeanor, but if he violates any other character of combination agreement he cannot be prosecuted.

In the *Hodges* case, which arose on demurrer to an indictment, the indictment did not allege that the tobacco combination in question was not entered into for the purpose of enhancing tobacco above its real value. Hence, it is clear that the rule laid down in the *Brumback* case was adhered to, and the presumption is, where a pool is formed *to enhance the price of farm products, that an enhancement above the real value is not sought.*

So, in *Collins* v. *Commonwealth*, 141 Ky., 565, 133 S. W., 233, with no evidence as to the purpose of the pool or as to "real value," Collins was convicted and fined $150 for disposing of his own crop of pooled tobacco without the consent of the pool agent. To the same effect is *Malone* v. *Commonwealth* (Ky.), 133 S. W., 235. These cases are on this Court's present docket,—Nos. 35, 36.

But, in the prosecutions of plaintiff in error, the court has presumed and permitted, by its instructions, the jury to assume that the purpose of its alleged combination was to enhance prices beyond their "real value."

In *I. H. Co. of A.* v. *Commonwealth* (1910), 137 Ky., 668, 677, the court said:

> "When, therefore, the prosecutions show (1) that there has been a combination among all or any of the producers of a commodity of merchandise, by which its output is restricted or controlled alone by the confederates in the scheme; (2) that the market price of the article was then materially enhanced; (3) that the conditions affecting commerce in general are normal; (4) that the competition otherwise than for the combination complained of would be fair—there would be established *prima facie*, a case of violation of the statute."

What constituted normal trade conditions the court,

in *International Harvester Company* v. *Commonwealth*, 137 Ky., 668, 126 S. W., 352, at p. 355, thus defined:

> "When there is an absence of such abnormalities as panics, widespread strikes, wars and such, the conditions may be said to be normal."

In *I. H. Co. of A.* v. *Commonwealth* (1911), 144 Ky., 403, 410, the court said:

> "But the fact that the combination was formed, in connection *with the legal presumption that it was formed for the purpose of fixing and controlling prices*, is sufficient to show, in the absence of countervailing evidence, that an advance in the price prevailing before the combination was entered into, enhanced the price of the articles above its real value, if market conditions before and after the advance were substantially the same, and the cost of production had not materially increased, or in proportion to the advance."

In the present case (147 Ky., 564, decided in 1912), the court said (Tr., 164, 165):

> "It is now necessary to apply the principles thus stated to the facts of this case in order that we may determine whether the fine imposed by the verdict and judgment upon the appellant was authorized. Our reading of the record convinces us that the following facts were established by the evidence of the Commonwealth: 1st. That six companies or corporations engaged in the manufacture and sale of harvesting machines and all doing business in this state, * * * between which there had been previous competition, entered into a combination to fix and regulate, and did fix and regulate, the prices at which their machines should be sold throughout the United States; this combination being effected by transferring the ownership and control of the companies named and the business of each of them to the appellant corporation, known as the International Harvester Company, of America, which, since the combination, has controlled all the busines formerly done by the six companies separately. 2nd. That immediately following this combination the competition which had theretofore obtained between the several

companies ceased and the prices of the machines formerly sold by each of them were by appellant increased above the prices at which they were sold prior to the combination; the increase in price of binders being $12, mowers $4, and hay rakes $2. 3rd. That the market conditions were normal both before and after the combination. 4th. That the machines named were sold and offered for sale by appellant at the increased prices in this state and in Bullitt County, since the combination was effected, and within a year before the institution of this action.

Proof of the foregoing facts was sufficient to create **the legal presumption that the increase in the price of the machines was an increase above their real value,** and was an intended consequence and result of the combination; as previously stated, their real value as marketable commodities being their market value under fair competition and under normal conditions.

Upon the Commonwealth's showing of the above facts, the burden of proof was shifted to appellant to show that such increase in price on the machines after the combination, was due to the increased cost of material used in their manufacture, the increased price of the labor employed in their production, or increase in the cost of putting them on the market."

Under the Kentucky decisions what is it incumbent upon the Commonwealth to show and how are such factors shown?

(1) That there has been a combination. This may be proved by evidence that one company is now selling machines formerly manufactured by six companies. This fact carries with it the "legal presumption that the combination was formed to fix and control prices."

(2) That prices were raised after the combination.

(3) That market conditions were normal both before and after the combination,—that is, that there was no "war, widespread strike or panic."

The testimony of every witness was that all farm ma-

chinery, whether sold by plaintiff in error or others, all farm lands, farm products, labor, and cost of living generally had advanced. The testimony also showed that everything had advanced to a greater per cent. than farm machinery. (Tr., 37, 41, 42, 54, 58, 63, 64, 67, 71, 72.)

The Statutes, as Construed and Enforced, Deny the Equal Protection of the Law.

Kentucky is an agricultural state. All the Anti-Trust cases that have reached its Court of Appeals were brought in country counties. The jurors are purchasers and consumers and are naturally inclined to regard every increase in the price of a manufactured article as an enhancement above its real value. The rules laid down by its Court of Appeals justify this and if perchance a prosecution should be brought against a combination formed to enhance the prices of farm products—the record of Kentucky courts shows no such case—it is certain that the jurors would adopt the view of the Court of Appeals, that the enhancement sought by such a combination was not above the real value.

All the suits brought under the unified Anti-Trust and Tobacco Pooling Acts are of two classes. One against dealers in manufactured products, such as are the cases at bar. In those, plaintiff in error has been convicted of a crime for increasing the prices of its harvesting machinery from 5 to 15 per cent. during the past 10 years. The court assumed that the object of the alleged combination was to increase prices and the juries readily found that those increases, though no greater than the increases in the prices of all other articles of merchandise in the same community during the same period, were criminal.

The other class were prosecutions of farmers for withdrawing from pools and thereby tending to lessen the power of the pool to enhance and maintain the price of tobacco at a point fixed by the pooling agent. Hodges, Collins and Malone were all penalized under the same law because they disregarded the price fixed by a tobacco pool,—prices which were from 100 to 300 per cent. higher than those prevailing before the Burley Society was organized and the night-riding propaganda began. Malone and Collins sold their tobacco for 17 cents a pound, whereas the average price in that district, in 1899, was only 5.9 cents a pound. (See *supra*, p. 55.)

In the *Brumback* case the court held that a pool formed for the express purpose of enhancing the price of the pooled tobacco would be presumed not to seek an enhancement above the real value, and that rule was followed in the criminal actions against Hodges, Collins and Malone, *supra*.

In the *Harvester* cases the Court of Appeals held that, although the enhancement of its prices was no more than the increase in the cost of labor and materials used in their production, and no greater than in the prices of agricultural implements made by other manufacturers, it might be presumed that the economies in sale would enable the company to meet the increased manufacturing cost without raising prices, and upon this reasoning it sustained a conviction and a heavy penalty because a farmer jury inferred that such an increase was an enhancement above the real value.

In the *Tobacco Pooling* cases the same court held that, although the very purpose of the combination was to enhance the prices, and the increase must be deemed the result of the pool, the court itself would assume, without evidence, that the pooling contract did not have for its

purpose an enhancement above the real value. Yet, at the same time, in the *Harvester* cases, the court held that the combination being proved it would be legally presumed that its purpose was to raise prices, and with proof of an increase it would be inferred, unless the contrary were proven, that the purpose of the combination and its effect was an enhancement above the real value of the goods.

Thus, the history of this legislation and of judicial decisions since and including the year 1906, shows that the legislature sought to enable the farmers of the state to obtain a higher price for their products, by allowing them to combine among themselves and put the control of such products in the hands of one person, rather than leave them open to free competition among sellers. This is clear from the acts themselves, and the enforcement of the law, as interpreted by the Kentucky Court of Appeals, has been along this line.

The Fourteenth Amendment is not directed simply against state law. It prohibits the state from making or enforcing any law which shall deny to any person within its jurisdiction the equal protection of the laws.

This is a prohibition against state action of any kind which produces the result forbidden.

In *Henderson* v. *Mayor,* 92 U. S., 259, this court condemned a law of the State of New York, not simply upon its language but upon its effect, Mr. Justice MILLER saying, at p. 268:

> "In whatever language a statute may be framed its purpose must be determined by its natural and reasonable effect."

So in *Ex parte Virginia,* 100 U. S., 339, the court said, at p. 346:

> "We have said the prohibitions of the Fourteenth

Amendment are addressed to the States. They are, 'No State shall make or enforce a law which shall abridge the privileges or immunities of citizens of the United States, * * * nor deny to any person within its jurisdiction the equal protection of the laws.' They have reference to actions of the political body denominated a State, by whatever instruments or in whatever modes that action may be taken. A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning. Then the State has clothed one of its agents with power to annul or to evade it."

In *Yick Wo* v. *Hopkins,* 118 U. S., 356, an ordinance perfectly valid upon its face, was so enforced as to be held to deny equal protection of the law. The court said (p. 373):

"This conclusion, and the reasoning on which it is based, are deductions from the face of the ordinance, as to its necessary tendency and ultimate actual operation. In the present cases we are not obliged to reason from the probable to the actual, and pass upon the validity of the ordinances complained of, as tried merely by the opportunities which their terms afford, of unequal and unjust discrimination in their administration. For the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that, whatever

> may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States."

In *Ex parte Virginia,* a judge of a Virginia county court habitually excluded negroes from grand and petit juries. He was arrested under an indictment for violating the Federal statute—that no citizen should be disqualified from such jury service, on account of race or color. This court denied his petition for a writ of habeas corpus on the ground that the judge's habitual action was contrary to the Fourteenth Amendment.

In the *Yick Wo* case, the ordinance, though general in terms, in effect applied only to the portion of San Francisco occupied by the Chinese, and therefore was special legislation as to them.

So in the instant cases, though the Court of Appeals has contrived, in words, a uniform law as to combinations, it is perfectly obvious that it does and must, in operation, discriminate against all combinations other than those of producers of tobacco and grain. And the Court of Appeals works out this discrimination by making one presumption as to agricultural poolers and an opposite presumption as to all others.

As to manufacturers, the crime is to form any combination or consolidation. As to producers of tobacco and grain, the crime is to violate the terms, or in any wise weaken the power, of such a combination.

Though no statute was attacked as unconstitutional

in *Ex parte Virginia,* the county court was being used to deny a certain class of citizens the equal protection of the laws. So in Kentucky the court's construction and the natural inclination and interest of Kentucky jurors inevitably operate in favor of producers of tobacco and against sellers of manufactured articles, to the obvious prejudice of plaintiff in error.

We respectfully submit that this court can not shut its eyes to facts which are known of all men; which are apparent upon the face of legislative enactments and judicial records; and that these facts show that the Acts of March, 1906, and March, 1908, and the conduct of the prosecuting officers and the courts of the State thereunder, have produced a discrimination against plaintiff in error and others likewise situated, which is a denial of the equal protection of the laws.

Therefore to require, in fact, the vendors of manufactured products to fix a price upon them at the peril of being compelled to show to a jury, that such price is neither above nor below that which the jury shall guess would have been their market value had there been no combination, and to allow those selling agricultural products to fix a price, without fear of challenge, is practically the same as if the law allowed the one class to combine to obtain a greater price, and prohibited the same liberty to the other class.

The anti-trust laws of Kentucky as construed and enforced fall directly within the scope of *Connolly* v. *Union Sewer Pipe Co.,* 184 U. S., 540, 560.

In *Cotting* v. *Kansas City Stock Yards Co.,* 183 U. S., 79, 104, 105, 112, this court held unconstitutional the Kansas enactment making all stock yards of a certain size public stock yards whose charges were fixed by the act.

The court, by Mr. Justice Brewer, used language pertinent here:

> (p. 105) "We cannot shut our eyes to well-known facts. Kansas is an agricultural State. * * * Now, shall they whose interests are all along the line of production, having by virtue of their numerical majority the control of legislation, be permitted to say to one who acts as an intermediary between transportation and sale, that while we permit no interference with the prices which we put upon our products, nevertheless we cut down your charges for intermediate services. * * *
>
> 'Every partial * * * law, which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were this otherwise, odious individuals and corporate bodies would be governed by one rule, and the mass of the community, who made the law, by another.'
>
> This statute is not simply legislation which in its indirect results affects different individuals or corporations differently, * * * but is a positive and direct discrimination between persons engaged in the same class of business and based simply upon the quantity of business which each may do. If such legislation does not deny the equal protection of the laws, we are unable to perceive what legislation would."

THE LAW ITSELF MUST SAVE THE RIGHTS OF PARTIES, AND THEY CANNOT BE LEFT TO THE DISCRETION OF THE COURTS.

This is illustrated in the case of *Louisville Railroad Company* v. *Stock Yards Company,* 212 U. S., 133, particularly at pages 143 and 144.

Suit was brought under the provision of the Kentucky Constitution to require the Louisville R. R. Company to make an interchange with the Southern, so that it might deliver carloads of stock at the stock yards. In the Kentucky Court of Appeals it was urged that to re-

quire one railroad to deliver its equipment to another, without security for its use and return, would be a deprivation of property without compensation. To avoid the force of this suggestion, the Court of Appeals directed the lower court to enter a decree requiring the interchange, but providing security for the return of the equipment and compensation for its use. It was insisted in this Court that such a decree furnished full protection, and therefore the Fourteenth Amendment could not apply. But this Court said (212 U. S., at pp. 143, 144):

> "It was argued, however, that the requirement that the plaintiff in error should deliver its own cars to another road was void under the Fourteenth Amendment as an unlawful taking of its property. In view of the well known and necessary practice of connecting roads, we are far from saying that a valid law could not be passed to prevent the cost and loss of time entailed by needless trans-shipment or breaking bulk, in case of an unreasonable refusal by a carrier to interchange cars with another for through traffic. We do not pass upon the question. It is enough to observe that such a law perhaps ought to be so limited as to respect the paramount needs of the carrier concerned, and at least could be sustained only with full and adequate regulations for his protection from the loss or undue detention of cars, and for securing due compensation for their use. The constitution of Kentucky is simply a universal undiscriminating requirement, with no adequate provisions such as we have described. The want cannot be cured by inserting them in judgments under it. The law itself must save the parties' rights, and not leave them to the discretion of the courts as such. See *Security Trust & Safety Vault Co.* v. *Lexington*, 203 U. S., 323, 333; *Roller* v. *Holly*, 176 U. S., 398, 409; *Connecticut River R. R. Co.* v. *County Commissioners*, 127 Massachusetts, 50, 57; *Ash* v. *Cummings*, 50 N. H., 591; *Moody* v. *Jacksonville, Tampa & Key West R. R. Co.*, 20 Florida, 597; *Ex parte Martin*, 13 Arkansas, 198; *St. Louis* v. *Hill*, 116 Missouri, 527. It follows that the requirement of the

> state constitution cannot stand alone under the Fourteenth Amendment, and that the judgment in this respect also, being based upon it, must fall. We do not mean, however, that the silence of the constitution might not be remedied by an act of legislature or a regulation by a duly authorized subordinate body if such legislation should be held consistent with the state constitution by the state court."

In the instant cases, the Court of Appeals of Kentucky has endeavored to do exactly what it attempted to do in the case to which we have above made reference. Finding the Act of 1890, as supplemented by the Act of 1906, rendered the whole legislation in Kentucky on the subject of "Trusts" inimical to the Fourteenth Amendment as determined by this court in *Connolly* v. *Sewer-Pipe Company*, 184 U. S., 540, it endeavored to avoid this result by calling to its aid section 198 of the Kentucky Constitution. It then endeavored to formulate rules under which section 198 of the Constitution would become effective, although it had theretofore decided (in the *Grinstead* case and others) that this provision of the Constitution was not self-executing, and required, in order to be put in force, the action of the legislature; and that the Act of 1890 was not limited in its operations by the provisions of the Constitution. The court then endeavored, itself, to lay down rules under which section 198 could be made effective; and, without any legislative action on the subject, it determined that the penalties prescribed in the Act of 1890 applied to an offense not therein mentioned, but to an offense within the ambit of section 198 of the Constitution, although the legislature had not endeavored, in any way, to affix any penalties to the offense described by that section of the Constitution. The court then supplemented this judicial legislative action by various definitions set out in subsequent decisions, until, at last, it satisfied itself that it

had formulated such an act as the legislature would probably have passed if the legislature had determined to carry out the provisions of section 198.

As Judge HOBSON said in his dissent in the *Harvester* case, 131 Ky., at p. 582:

> "The fixing of penalties for offenses is strictly a legislative function, and the court should not make the penalty imposed for one offense apply to a different offense, which was not in the mind of the legislature in enacting the act."

For the reasons stated the judgments in the cases at bar should be reversed.

Respectfully submitted,

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APPENDIX.

Dissenting opinion in Commonwealth v. International Harvester Co., 131 Ky., p. 580, 115 S. W., at p. 712 et seq.

"HOBSON, J. (dissenting). Judge BARKER, Judge LASSING, and I concur in the conclusion of the court affirming the judgment appealed from; but we do not concur in so much of the opinion as holds that prosecutions may now be maintained under the act of 1890. The Legislature of Illinois passed an act similar to our act of 1890, but by one provision of it exempted from it agricultural products in the hands of the producer. In *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S., 540, 22 Sup. Ct., 431, 46 L. Ed., 679, it was held by the Supreme Court of the United States that the act was void upon the ground that farmers were exempted from its operation, and, therefore it could not be enforced against any one. Our act of 1890 did not exempt farmers from its operation, but the act of 1906 expressly authorized farmers to do what was forbidden by the act of 1890. We are unable to see that there is any substantial distinction between an exemption of farmers in the original act, and an exemption of them in a subsequent act. If the provisions of the Constitution of the United States may be evaded by putting the exemption in a subsequent act and not in the original act, they amount to nothing.

It is said, however, that the act of 1906, in so far as it authorizes farmers to pool their products or to combine together to raise the prices of their products beyond their real value, is in conflict with the Constitution of the state; and the act, therefore, being to this extent void, it only authorizes farmers to combine to raise the prices of their products up to their real value. And as farmers are not allowed by the act, when read in connection with the Constitution, to combine to raise prices above the real value of their products, the act of 1890 may still be en-

forced against those who combine to raise prices above the real value or to lower them below the real value. The difficulty with this view is that the Legislature has not provided a penalty for combining to raise prices above the real value of the articles or to depreciate them below the real value. By section 3915, Ky. St. 1903, all combinations, contracts, or agreements having for their object the fixing or in any way limiting the quantity of any article or commodity to be produced or manufactured, bought or sold, are declared illegal, and all persons entering in such agreements or contracts shall be deemed guilty of the crime of conspiracy. By section 3916, all arrangements made with the intent or having the effect to limit, fix, or change the price or production or sale of any article, or to restrict or diminish the output of any article, are declared illegal. By section 3917, all persons violating the provisions of the act shall be punished by a fine of not less than $500, nor more than $5,000. And by section 3919, if a corporation violates the provisions of the act, it forfeits its charter. By section 3918, no action may be maintained to recover for the price of any article sold in violation of the act, or upon any contract made in violation of it. It is a very rigorous statute, and has been more than once construed by this court, the court holding that the question whether the combination or agreement raised prices above the real value of the article was immaterial; that the purpose of the statute was to forbid all combinations to regulate, fix, or control prices, and to leave prices to be regulated entirely by the law of supply and demand. *Commonwealth* v. *Grinstead*, 108 Ky., 69, 55 S. W., 720, 57 S. W., 471; *Commonwealth* v. *Bavarian Brewing Co.*, 112 Ky., 930, 66 S. W., 1016. What is the real value of the article is entirely immaterial under the act of 1890. The penalties denounced by that act are for the combinations referred to in that act. If the Legislature had had in mind providing a penalty for combinations to raise the price of products above their real value, or to lower prices below the real value of the articles, it might have provided very different penalties from those named in that act. The fixing of penalties for offenses is strictly

a legislative function, and the court should not make the penalty imposed for one offense apply to a different offense, which was not in the mind of the Legislature in enacting the act.

The Legislature realized that the farmers were confronted by an unusual condition, and that the act of 1890 had failed of its purpose. So concluding, they determined to give the farmers a free hand, and to allow them to fight combination with combination. No one can read the act of 1906 (though he reads as he runs) without perceiving that the Legislature intended it to apply to corn, wheat, oats, tobacco, cattle, and all other farm products, and that they intended that the farmers should be entirely exempt from the operation of the act of 1890. Section 198 of the Constitution is not self-executing. The Legislature is left to determine when the necessity arises for legislation, and what legislation will best meet the necessity. This was expressly so determined in *Commonwealth* v. *Grinstead,* 108 Ky., 59, 55 S. W., 720, 57 S. W., 471. Under the power thus vested in the Legislature, it passed the act of 1906. While it may be justly held that contracts in violation of section 198 of the Constitution will not be enforced because contrary to the public policy of the state as expressed in the Constitution, manifestly a criminal offense can only be created by legislative action. We concurred in the opinion in *Owen County Burley Tobacco Society* v. *Brumback,* 107 S. W., 710, 32 Ky. Law Rep., 916, holding the act of 1906 valid. But that opinion did not involve the question whether the two acts could both stand under the decision of the United States Supreme Court.

The Legislature had undoubted power to repeal the act of 1890, and it could do so without enacting any law in its place. By the act of 1906, it did repeal the act of 1890, so far as farmers and their products are concerned. Nothing is clearer than that the Legislature intended to wipe out the act of 1890 as to farmers and their products. By the first section of the act, combinations and pools as to farm products are declared lawful. By the second section of the act, it is provided that such combinations shall not be declared illegal or invalid. The same idea is

again expressed in the third section. The fourth section declared that an emergency exists which requires the act to take effect from its passage. See, also, Acts 1908, p. 38, c. 8. The things which the act permits and which it declares shall not be illegal are the things which the act of 1890 made illegal. The second act is therefore necessarily a repeal of the first act as to farmers and their products, and no prosecution can now be maintained under the act of 1890 for any combination of farmers in the selling of their products. But under the decision of the United States Supreme Court, this repeal of the act of 1890 as to farmers operates to repeal it as to all others. To say that the act of 1890 is still in effect in any respect as to farmers selling their products is to say that although the Legislature had power to repeal the act of 1890, and deliberately repealed it as to farmers, it is still in force as to them to some extent, which is only another form of saying that the Legislature could not repeal the act of 1890, as to farmers, although it undertook to do so. The cardinal error of the opinion lies in its ignoring the fact that the Legislature had power to repeal the act of 1890, and when that act was repealed as to farmers there was no law in force under which this prosecution may be maintained.

Under the rule now declared by the court, it will be a question for the jury in each case whether the combination raised the price above the real value of the article or lowered it below it. It will therefore be a question for the jury in each case what was the real value of the article. The people who make the combinations may suppose that the value which they fix is the real value, while one jury may come to one conclusion on the subject, and another to a different conclusion; so no man will be able to know whether he has violated the law until after he is tried. In *Ex parte McNulty*, 77 Cal., 164; 19 Pac., 237; 11 Am. St. Rep., 257, it was well said by the Supreme Court of California: 'Before one can be convicted of a crime, there must be some rule of action prescribing with some certainty and expressing intelligently the sovereign will.'

By Section 816, Ky. St., 1903, a penalty was imposed upon a carrier if he charged more than a just and reasonable rate of toll. Holding this statute void in *L. & N. R. R. Co.* v. *Commonwealth*, 99 Ky., 136; 35 S. W., 130 (33 L. R. A., 209; 59 Am. St. Rep., 457), the court said: 'That the corporation has fixed a rate which it considers will bring it only a fair return for its investment does not alter the nature of the act. Under this statute it is still a crime, though it cannot be known to be such until after an investigation by a jury, and then only in that particular case, as another jury may take a different view, and, holding the rate reasonable, find the same act not to constitute an offense. There is no standard whatever fixed by the statute, or attempted to be fixed, by which the carrier may regulate its conduct, and it seems clear to us to be utterly repugnant to our system of laws to punish a person for an act, the criminality of which depends, not on any standard erected by the law which may be known in advance, but on one erected by a jury; and especially so as that standard must be as variable and uncertain as the views of different juries may suggest, and as to which nothing can be known until after the commission of the crime. If the infliction of the penalties prescribed by the statute would not be the taking of property without due process of law and in violation of both state and federal Constitutions, we are not able to comprehend the force of our organic laws.'

This opinion followed the decision of Judge Baxter in *L. & N. R. R. Co.* v. *Railroad Commission* (C. C.), 19 Fed., 679. In *Tozer* v. *U. S.* (C. C.), 52 Fed., 917, Justice Brewer thus states the rule: 'But in order to constitute a crime, the act must be one which the party is able to know in advance whether it is criminal or not. The criminality of an act cannot depend upon whether a jury may think it reasonable or unreasonable. There must be some definiteness and certainty.'

The same question came before this court in *Commonwealth* v. *L. & N. R. R. Co.*, 46 S. W., 700; 20 Ky. Law Rep., 491, where the validity of Section

818, Ky. St., 1903, was involved. That section imposed a penalty upon a carrier who gave any unreasonable preference to any person or locality, and the court there reaffirmed the rule laid down in the previous case. The soundness of these cases was recognized by this court in *Commonwealth* v. *Grinstead,* 108 Ky., 76; 55 S. W., 720; 57 S. W., 471, where, in answer to the argument that the legislature, in passing the very act in question, should have limited its provisions to combinations to raise prices above the real value of the article or to lower them below the real value, this court said: 'Had it done so, there is strong authority in this state for holding that such an enactment, imposing a penalty for a combination to depreciate below its real value any article, would be held void for uncertainty.'

The same principle was applied in *Matthews* v. *Murphey,* 63 S. W., 785; 23 Ky. Law Rep., 750; 54 L. R. A., 415, where the statute authorizing a physician's certificate to be canceled for unprofessional conduct was held void. In the same way, in *Jackson Ex parte,* 45 Ark., 164, a statute was held void which punished any one who committed any act injurious to the public health or morals or the due administration of the laws. To the same effect are *Samuelson* v. *State,* 116 Tenn., 470; 95 S. W., 1017; 115 Am. St. Rep., 805, and *Cook* v. *State,* 26 Ind. App., 278; 59 N. E., 489.

The real value of a thing is much more indefinite than the expressions used in any of the acts referred to. It may mean the cost of production plus a reasonable profit and allowance for the amount of money invested. But what is a reasonable profit, or what allowance should be made for investment, are too indefinite to be made the subject of a crime, without any standard in advance by which the crime is to be determined. The expression by others might be taken to refer to the worth of the article to the consumer; that is, what can he make out of it, or what he could afford to give for it rather than to do without it. From this standpoint the expression is equally indefinite. From which standpoint a jury would look at the matter, and what they would con-

sider a reasonable profit, would depend on the constitution of each jury. To say that the expression means the market value of the article when not affected by abnormal conditions is only to add to the confusion; for what are abnormal conditions, and who is to judge whether the conditions are abnormal. The market value of an article may be determined with some certainty, but what its market value will be under other conditions than those that exist, is speculation pure and simple.

To steal is an offense. Statutes grading the punishment of the offense according to the amount stolen are universally in force. The value of the article stolen, though, in such cases is always determined by its market value, a thing which can be fixed with reasonable certainty. To compare with this the speculation as to what the market value of a thing might be under different circumstances than those existing, is for the court to shut its eyes to the principle upon which the rule of law rests. Where there is a question of market value or of ordinary care, it may be submitted to the jury in a civil or a criminal case, because there is no better standard that may be reasonably attained. But when you come to agreements raising or lowering the prices of products, it is very easy for the legislature to define to what extent such agreements shall be unlawful; for the legislature may specifically regulate the subject, and it should not leave the law so indefinite that men may not safely transact their business. No one should be convicted of crime upon the mere speculation of a jury, after the act is done. To illustrate, the farmers of Kentucky recently sold a large quantity of tobacco at $16 a hundred. Can they all be indicted and convicted under the statute by a jury of persons, who do not produce tobacco, upon proof that the tobacco was not really worth more than $12, and could be produced at a handsome profit at that price? Again, the Society of Equity took its rise in the West, where the farmers pooled their wheat, refusing to sell it for less than $1 a bushel. If the farmers of Kentucky should make a similar arrangement, and fix the

price at $1.50 a bushel, could they all be convicted under the statute upon proof that the price of wheat in the market under normal conditions would be less than $1.50? To so hold is simply to refuse to enforce the plain legislative intent in enacting the statute of 1906, and to hold that the Act of 1890 is to some extent in force as to farmers when the legislature expressly said it should not be in force as to them at all. The very purpose of all of these arrangements is to affect the market price. If they did not affect the market price, they would be useless. Under the rule laid down by the court, no one who enters into such an arrangement can now tell when he may safely go into the pool without violation of law. It will, in our judgment, create great confusion, disturb business, and engender litigation. It was not contemplated by the legislature, and is not warranted by what the legislature has enacted.

We, therefore, dissent from the opinion of the court."

SUBJECT INDEX AND CITATIONS

TABLE OF CASES AND STATUTES CITED.

In the Supreme Court of the United States

OCTOBER TERM, A. D., 1913.

INTERNATIONAL HARVESTER COMPANY OF AMERICA - - - - - - - - - - *Plaintiff in Error.*
v. No. 276.
COMMONWEALTH OF KENTUCKY - - *Defendant in Error.*

INTERNATIONAL HARVESTER COMPANY OF AMERICA - - - - - - - - - - *Plaintiff in Error.*
v. No. 291.
COMMONWEALTH OF KENTUCKY - - *Defendant in Error.*

INTERNATIONAL HARVESTER COMPANY OF AMERICA - - - - - - - - - - *Plaintiff in Error.*
v. No. 292.
COMMONWEALTH OF KENTUCKY - - *Defendant in Error.*

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

The Section of the Constitution of Kentucky and the laws of that State involved in the instant cases are as follows:

Section 198 of the Constitution.

The Act of the General Assembly of Kentucky of May 20, 1890, which is sections 3915 to 3921 inclusive of Kentucky Statutes, Carroll's Edition.

The Act of the General Assembly of Kentucky of March 21, 1906 and the Act of the General Assembly of Kentucky of March 13, 1908.

Sections 3915 to 3921, inclusive, of Kentucky Statutes, were enacted before the Constitution containing Section 198 was adopted, but it was held by the Court of Appeals of Kentucky that the constitutional provision did not repeal Sections 3915 to 3921. Section 3915 defines the offense denounced. Section 3917 provides the punishment to be inflicted for violation of Section 3915, which is, for corporations, a fine of not less than Five Hundred ($500.00) Dollars nor more than Five Thousand ($5,000.00) Dollars. The other sections of the Act are not material to the issues involved. Section 198 of the Constitution reads as follows:

> "It shall be the duty of the General Assembly from time to time, as necessity may require, to enact such laws as may be necessary to prevent all trusts, pools, combinations or other organizations, from combining to depreciate below its real value any article, or to enhance the cost of any article above its real value."

Section 3915 of the Kentucky Statutes is as follows:

> "That if any corporation organized under the laws of Kentucky, or under the laws of any other State or country, for transacting or conducting any kind of business in this State, or any partnership, Company, firm or individual, or other association of persons, shall create, establish, organize or enter into, or become a member of or a party to, or in any way interested in any pool, trust, combine, agreement, confederation or understanding with any other corporation, partnership, individual or person, or association of persons, for the purpose of regulating or controlling or fixing the price of any merchandise, manufactured articles or property of any kind, or shall enter into, become a member of, or party to or in any way interested in any pool, agreement, contract, understanding, combination or conferedation, having for its object the fixing, or in

any way limiting the amount or quantity of any article of property, commodity or merchandise to be produced or manufactured, mined, bought or sold, shall be deemed guilty of the crime of conspiracy, and punished therefor as provided in the subsequent sections of this act."

The Act of March 21, 1906, Ky. Stats., Section 3941a, is as follows:

"*Be it enacted by the General Assembly of the Commonwealth of Kentucky*:

"§ 1. It is hereby declared lawful for any number of persons to combine, unite or pool, any or all of the crops of wheat, tobacco, corn, oats, hay, or other farm products raised by them, for the purpose of classifying, grading, storing, holding, selling or disposing of same, either in parcels or as a whole, in order or for the purpose of obtaining a greater or higher price therefor than they might or could obtain or receive by selling said crops separately or individually.

"§ 2. That contracts or agreements made or entered into by persons with each other, the object or intent of which is to unite, pool or combine all or any of the crops of tobacco, wheat, corn, oats, hay, or other farm products, raised by such persons, for the purpose of classifying, grading, storing, holding, selling or disposing of said crops, or any of them, either in parts or as a whole, in order, or for the purpose of obtaining a better or higher price therefor than could or might be obtained by selling said crops separately or individually, are hereby permitted, and shall not, because of any such combination or purpose of said persons, be declared illegal or invalid.

"§ 3. Such persons so entering into such agreement or contract as is set out in the foregoing sections, are hereby permitted to select an agent or agents through or by or with whom said parties so entering into such agreements may classify, grade,

store, hold, sell or dispose of said crops, or any of them, and said agent or agents shall have the right to take, receive, hold, store, classify, grade, sell or dispose of said crops so placed in such agreement as directed or authorized by their principal, for the purpose of accomplishing the object of such combination or agreement between such principals, and contracts and agreements entered into by such agent or agents for the purpose of classifying, grading, storing, holding, selling or disposing of said crops so combined, united or pooled, either in parcels or as a whole, are hereby permitted, and shall not, because of any such combination or purpose of such original agreement of such principals so entering into said combination, or of such agent or agents, be declared illegal or invalid."

The Act of March 13, 1908, is as follows:

"*Be it enacted by the General Assembly of the Commonwealth of Kentucky*:

"§ 1. That section 3 of an act entitled, An Act permitting persons to combine or pool their crops of wheat, tobacco and other products, and sell same as a whole, and making contracts in pursuance thereof valid, approved March 21, 1906, being Chapter 117 of the Acts of the General Assembly of the Commonwealth of Kentucky for the year 1906, be and the same is hereby amended and re-enacted so as to read as follows:

"Such persons so entering into such an agreement or contract as is set out in the foregoing sections are hereby permitted to select an agent or agents, through or by or with whom said parties so entering into such agreement may classify, grade, store, hold, sell, or dispose of said crops, or any of them, and said agent or agents shall have the right to take, receive, hold, store, classify, grade, sell or dispose of said crops so placed in said agreement, for the purpose of accomplishing the object of such combination or agreement between such principals,

and contracts and agreements entered into by such agent or agents for the purpose of classifying, grading, storing, holding, selling or disposing of said crops so combined, united or pooled, either in parcel or as a whole, are hereby permitted, and should not, because of any such combination or purpose of such original agreement of such principals so entering into said combination, or of such agent or agents, be declared illegal or invalid. All contracts heretofore made by any person or persons for the purpose set out in the foregoing sections are hereby declared valid, if otherwise legally binding on the parties. To prevent any breach or violation of any contract made for the purpose set out in the foregoing sections a restraining order and writ of injunction may be issued by proper officer, as prescribed in the Civil Code of Practice.

"For any breach or violation of any contract entered into for the purpose set out in the foregoing sections, the injured party may recover the damages sustained by him by reason of such violation of such contract of the person violating the same, and also of any person who shall induce or persuade another to violate such contract, which damages shall include the reasonable expense and attorney fee incurred by the injured party in prosecuting an action to recover such damages or to prevent a violation of such contract, if the party complaining shall succeed in doing so which may be recovered in the same action or original proceeding. Said agent when so selected as herein provided, shall have the sole right to sell said crops so pooled or combined, and it shall be unlawful for any owner of such crops to sell or dispose of same and for any person to knowingly purchase the same without the written consent of such agent, and upon conviction thereof, he or they shall be fined in any sum or amount not exceeding $250.00 for each offense, to be fixed by the jury in their discretion."

By virtue of Section 198 of the Constitution and the above laws of Kentucky, prosecutions against plain-

tiff in error were instituted by defendant in error in Bullitt County, Kentucky, Grayson County, Kentucky, and Todd County, Kentucky, to recover of it the fine imposed for violation of that section of the Constitution and those laws.

We here insert copy of petition filed in Bullitt County. The petition being the same in each county, with the name of the county changed.

Bullitt Circuit Court.

Commonwealth of Kentucky, Plaintiff.

vs.

International Harvester Company of America, Defendant

Petition.

The plaintiff, Commonwealth of Kentucky, says the defendant, International Harvester Company of America, is now and has been continuously for many years last past a corporation. It was incorporated under the laws of the State of Wisconsin and defendant has for many years continuously been engaged in business in this State and in Bullitt County, Kentucky.

Plaintiff says that in Bullitt County, Kentucky, the defendant within one year before the filing of this petition unlawfully and wilfully entered into and became a member of a pool, trust, combine, agreement, confederation or understanding with the McCormick Harvester Company, the Deering Harvester Company, the Milwaukee Harvester Machine Company, the Champion Machine Company, the D. M. Osborne Company, the Plano Machine Company—some of the above named companies are corporations and some stock companies, but which are corporations and which joint stock companies plaintiff does not know, nor does it know who are the members of any of said joint stock companies, nor does it know in

what State or States those that are corporations are incorporated—for the purpose of regulating, controlling and fixing the price of harvesting and farm machinery, reapers, rakes, binders, and repairs of same manufactured and produced or to be manufactured and produced by them and to enhance the cost of said articles above their real value.

Plaintiff says that defendant did, in Bullitt County, Kentucky, within one year before the filing of this petition in pursuance of said unlawful pool, trust, combination, agreement, confederation and understanding, regulate, control and fix the price of harvesting and farm machinery, reapers, mowers, rakes, binders and repairs of same manufactured by said defendant and by aforesaid joint stock companies and by aforesaid corporations and did enhance the price of same above their real value and did offer for sale and sell aforesaid machinery in Bullitt County, Kentucky, within one year before the filing of this petition at a price in excess of the real value of aforesaid machinery, and this was done unlawfully and wilfully by said defendant and in pursuance of the unlawful pool, trust, combine, agreement, confederation and understanding hereinbefore set out. All in violation of the statutes in such cases made and provided, and by reason thereof defendant became indebted to plaintiff in the sum of five thousand dollars.

Wherefore, plaintiff prays judgment against defendant in the sum of five thousand dollars and its costs herein expended and for all proper relief.

FRANK E. DAUGHERTY,
Commonwealth's Attorney Tenth Judicial District of Kentucky.

This petition will be found on pages 1 and 2, Bullitt County Transcript of Record.

In Bullitt and Todd counties plaintiff in error, by special demurrer to the petition, presented certain objec-

tions to the petitions. In the Grayson County case, the plaintiff in error, by special demurrer, raised somewhat different objections to the petitions, all of the objections being that the section of the Constitution and the laws upon which the prosecutions were based were invalid because in violation of certain sections of the Constitution of the United States. In the Bullitt and Todd cases, the cases were submitted to a jury upon testimony heard, and in each case the conviction followed. In the Grayson County case, by consent, the testimony in the Bullitt County case was alone considered and upon that testimony a judgment was rendered against the plaintiff in error. From those various judgments appeals were prosecuted to the Court of Appeals of Kentucky and those judgments affirmed. The opinion of the Court of Appeals in the Bullitt County case will be found on pages 162 to 169, inclusive, of Transcript of Record. The opinion in the Grayson County case will be found on page 18 of the Transcript of Record. The opinion in the Todd County case will be found on pages 77 to 81, inclusive, of Transcript of Record. The Bullitt County opinion will be found in 147 Kentucky, 564. The Grayson County opinion in 148 Kentucky, 572, and the Todd County opinion in 147 Kentucky, 795.

The judgment of the Court of Appeals of Kentucky in each of above cases is now before this court for its review.

STATEMENTS OF FACTS.

As we understand the rule, the decision of a question of fact by a court or jury in a state court is not subject to review in this Court. In Dower vs. Richard, 151 United States, 663, this Court uses the following language:

"The principal ground upon which the plaintiffs in error seek to reverse the judgment of the Supreme Court of California is that its decision in matters of fact was erroneous and contrary to the weight of evidence in the case, but to review the decision of the State court upon questions of fact is not within the jurisdiction of this court."

Again in the same case, the court said on page 664:

"Judgments of the circuit court in actions at law have remained reviewable by writ of error only. * * * * Upon such a writ of error this court, as is well settled, cannot review the decision of a question of fact, even if by the local practice, as in Louisiana, the law and the facts are tried together by a judge without a jury.

"In such case Mr. Justice Story said 'We have no authority as an appellate court upon a writ of error to revise the evidence in the court below in order to ascertain whether the judge rightly interpreted the evidence or drew right conclusions from it. That is the proper province of the jury or of the Judge himself, if the trial by jury is waived and it is submitted to his personal decision.' "

But defendant in error having undertaken to present its view of the facts disclosed by the record, we deem it proper to briefly state the facts upon which the verdicts of the jury in the lower courts are based.

The gist of the prosecution was that plaintiff in error in the counties mentioned formed a combination with other corporations engaged in like business, for the purpose of selling its manufactured product at a price greater than its real value, and that it did in pursuance of said combination, sell in the counties mentioned within a year before the filing of petitions, its manufactured product at a price above its real value. Upon the trial of the Bullitt County case, M. F. Crenshaw testified on behalf of the Commonwealth (defendant in error). He

testified that he was in the employ of defendant (plaintiff in error) as blockman, having charge of eight counties in Kentucky; that prior to 1902 and prior to the combination complained of in petition, the companies which went into the combination controlled about seventy-five or eighty per cent of the business, and the combination after it was formed controlled about the same per cent. (Page 45, Transcript of Record, Bullitt County). This testimony is uncontradicted.

It is undisputed that the combination was formed in September, 1902, and W. G. Gardner, who was blockman of defendant (plaintiff in error) testified in the Bullitt County case that a raise was made in the price of the machines controlled by the combination in the fall of 1902. This raise was made to apply to the 1903 business (Page 53, Bullitt County Transcript of Record.) M. F. Crenshaw testifies the first raise was made in 1903. (Page 35, Bullitt County Transcript of Record.) Crenshaw and Gardner agree, because the raise was determined by the combination in 1902, but did not go into effect until 1903. Both of those witnesses were employes of defendant (plaintiff in error) at the time, and were, of course, familiar with its prices. A raise was made again in 1905, and the third raise in 1907. The raises aggregated on the mowers $6.50; on the hay rakes, $2.00; on the binders, $14.00 and $14.50. (Testimony of M. F. Crenshaw, pages 35-36, Bullitt County Transcript of Record.)

Crenshaw further testifies that a number of men who had been employed before the combination, were discharged after the combination, and that one man did the work of three or four, and in his territory of eight counties the expense by a reduction of the force by reason of the combination amounted to seven or eight thousand dollars a year. (Page 35, Bullitt County Transcript of Record.)

All of this testimony is uncontradicted. J. L. Gardner, who was general manager for defendant (plaintiff in error) in forty-three counties, was introduced by it as a witness, and he testified that defendant sold on an average in his forty-three counties about five or six hundred binders a year; about two thousand mowers, and about twelve hundred hay rakes. There are one hundred and twenty counties in Kentucky. If the saving of expense in eight of those counties, by reason of the combination, in reduction of force alone, amounted to seven or eight thousand dollars, it is a very reasonable inference to say that the reduction in expense in this item in the State of Kentucky was not less than one hundred thousand ($100,000) dollars.

Again, if twelve hundred hay rakes were sold in forty-three counties in a year at an increased price of $2.00 per rake, that would be twenty-four hundred ($2,400.00) dollars. The increased price of mowers was $6.50. If two thousand per year were sold in forty-three counties, this would result in a total advance of not less than twelve thousand ($12,000.00) dollars. If six hundred binders per year were sold in forty-three counties at an increased price of $14.00, this would make an increase in the price of eighty-two hundred ($8,200.00) dollars, so the increased price of the machinery per year in forty-three counties of Kentucky aggregated twenty-two thousand, six hundred ($22,600.00) dollars. In the entire State, on the same basis, the total increase would be at least forty-four thousand ($44,000.00) dollars. So, from the undisputed testimony in the Bullitt County case, and the reasonable and natural inference to be drawn therefrom, by reason of the combination, defendant (plaintiff in error) lessened its expense by way of reducing its force, one hundred thousand ($100,000.00) dollars a year, making a saving or profit each year after the combination upon those two items, of one hundred and forty-four thousand ($144,000.00) dollars.

How much it saved by reason of the consolidation of the force of the various companies and the manufacture of its machinery under one system, the record does not disclose. Defendant's contention upon the question of fact is that the increased price of material going into the manufacture and the increased price of labor after the combination, and the increased efficiency of the machines justified the increased price. Upon this point it is sufficient to say that the proof is not clear that there was any increase in the metal that went into the machines, and while there is proof of the increase in wood that went into the machines, yet the proof shows that the amount of wood, or other material than metal, that went into the machines was an exceedingly small per cent of the whole. A significant fact upon this question is disclosed by the uncontradicted testimony of H. C. Miller, who testified in the Todd County case. He testified that in 1910 the cost of repairs for machines—the repairs including chains, sections, guards, knife-heads, pitmans and "everything of that sort"—was from twenty-five to thirty per cent cheaper than in 1902, before the combination, and that three or four companies other than the International Harvester Company (plaintiff in error) sold those repairs, and that the repairs could be used for all the machines. (See pages 61-2 Todd County Transcript of Record.)

A natural query would be: If the increased price of labor and material and the increased efficiency of the machines justified the increase in the price after the combination was formed, why did not those same elements require an increase of the price of the repairs which are composed of the identical material of which the machines are composed? The only difference being that the repairs are sold separately and the machine is simply a collection of the various parts, styled repairs, put together, and so

made into machines. The answer to that inquiry is that defendant (plaintiff in error) having a practical monopoly by reason of the combination in the machines could afford to fix the price as it pleased, but having no monopoly in the repairs, it was compelled to sell them on an open market, and therefore the prices were twenty-five or thirty per cent less than the machines. No unbiased person can read the record in the Bullitt and Todd County cases without coming to the conclusion that the verdict in each case is fully sustained by the testimony.

ARGUMENT.

Plaintiff in error discusses the construction placed by the Court of Appeals of Kentucky upon Section 198 of its Constitution and the various laws upon which the prosecutions in the instant cases are based. It is well to understand clearly the weight this Court will give to the construction of a State Constitution or State laws by the Court of last resort in that State.

In the National Cotton Oil Company vs. Texas, 197 United States, 130, a case in some respects similar to the cases at bar, it was contended by the National Cotton Oil Company, plaintiff in error, that certain acts of the Texas Legislature discriminated in favor of certain classes, and in discussing that question, this Court uses the following language:

> "It is further urged, whether or not such discrimination results from the Statutes is for us to determine, independently of what views the courts of the State may entertain of them and their relations. * * * * Upon this last contention depends the mode of approaching the other, and we will dispose of it

first. We cannot assent to it. There are cases in which we determine for ourselves the meaning of a State law, but this is not one of them. The contention of the company is that the Statutes of the State discriminate against it; in other words, deny it the equal protection of the law by forbidding it from doing what they permit others to do in similar circumstances, punish its acts and exempt from punishment the same acts when done by others. But the courts of the State are the tribunals appointed to administer the Statutes and impose their penalties and to do so they must necessarily interpret them. In other words they are the tribunals to declare the meaning of the Statutes, and if in declaring it, they make the Statutes discriminatory, then may the statutes become unconstitutional."

And in the same case, on page 133, the Court, referring to a decision of the Texas Court of Appeals, says:

"It is the effect of that decision also that the laws of the State against combinations and trusts are formed into a harmonious system of which the criminal provisions in other statutes and the Code are a part and that their provisions can be adjusted and reconciled so as to have constitutional operation."

In Lindsley vs. Natural Carbonic Gas Company, 220 United States, where certain provisions of the New York law was attacked as violative of certain sections of the Federal Constitution, this Court, on page 73, says:

"Coming to the provision in question, it is necessary to inquire what construction has been put upon it by the highest court of the State, for that construction must be accepted by the courts of the United States and be regarded by them as a part of the provisions when they are called upon to deter-

mine whether it violates any right secured by the Federal Constitution."

So it is perfectly manifest that this Court will consider the construction placed upon the Constitution or Statute of a State by the court of last resort in that State, as a correct construction, and determine whether or not that Constitution or Statute so construed is prohibited by any provision of the Federal Constitution.

Now, let us see what construction has been placed upon Section 198 of the Constitution and the laws of Kentucky as heretofore set out by the Court of last resort in that State. The construction of those various enactments together with Section 198 of the Constitution first came directly before the Court of Appeals in case of Commonwealth vs. International Harvester Company of America, reported in 131 Kentucky, beginning on page 551. The Court of Appeals is composed of seven judges and this case was decided by a divided court, four, a majority, united in the opinion delivered by Judge O'Rear, and three uniting in the dissenting opinion delivered by Judge Hobson. We might say here that after this opinion was delivered the views of the majority of the court have been reiterated in other opinions of the court, and there has been no dissent. So the law, as it now stands in Kentucky, has the unanimous endorsement of its highest court.

The Harvester Company was indicted under the laws heretofore quoted, but the indictment failed to say that the purpose of the combination was to sell their product above its real value, and that it did, in pursuance of that purpose, sell its product in Hardin County, Kentucky, above its real value. A demurrer was filed to the indictment by the Harvester Company and that demurrer was sustained by the lower court and the indictment dismissed, and from the judgment dismissing the indictment the Commonwealth appealed. The opin-

ion of a majority of the Court of Appeals of Kentucky in that case fully and clearly explains the law of the State, and we feel justified in quoting from it at length:

> "Appellee demurred to the indictment, on the ground that, as it failed to show when the offense charged had been committed, it must be presumed that it was at any period covered by the indictment most unfavorable to the prosecution, which would be subsequent to March 21, 1906, and prior to the time the indictment was returned. Commonwealth v. T. J. Megibben Co., 101 Ky., 195; 40 S. W., 694; 19 Ky., Law Rep., 291. It was therefore contended by appellee that inasmuch as the act of 1890 made the transaction with which it was charged illegal, and as the act of March 21, 1906, allowed farmers to do the same thing as legal, the defendant was not furnished equal protection under the laws of Kentucky, and that in consequence the act of May 20, 1890, must fail, as the State is forbidden by the fourteenth amendment to the Constitution of the United States from denying equal protection of the laws to all persons within its jurisdiction. The circuit court sustained the demurrer on the ground that discrimination was worked against appellee under the statute, and dismissed the indictment. From the judgment the Commonwealth has prosecuted this appeal for a construction of the law.
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> "We are satisfied the circuit court was not in error in sustaining the demurrer to the indictment, but that it was in error as to the ground upon which it based its ruling. As the construction of these statutes seems to be important to the welfare of the State, we here set down our interpretation of them, as reasons for the conclusions at which we have arrived.
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> "In the first place, there is no denial that if the two statutes in question, when construed according to the canons of statutory construction, confer the right upon one class of citizens to do an act, which is made a criminal offense if done by any other class, it would contravene the fourteenth

amendment to the Federal Constitution, which declares: 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction equal protection of the laws.' The Federal Constitution is the paramount law of the land. A statute of a State in conflict with it is void. State statutes, therefore, when they come within the domain of the powers of government over which the Federal Constitution extends, must be read and applied with reference to the provisions of that instrument.

"The laws of the State, particularly its statutory laws, are such enactments as its legislative body promulgates, as expounded and applied by its courts. A State statute has such meaning as the judicial department of that State construes it to have. Bank of Hamilton v. Dudley's Lessee, 2 Pet., 492; 7 L. Ed., 496; Elmendorf v. Taylor, 10 Wheat, 152; 6 L. Ed., 289; Railroad v. Georgia 98 U. S., 359; 25 L. Ed., 185. This is so, even though, without judicial construction, the Federal courts might have, from the language of the statute, construed it differently. Green v. Neal's Lessee, 6 Pet., 291; 8 L. Ed., 402; Bell v. Morrison, 1 Pet., 351; 7. L. Ed., 174; Nesmith v. Sheldon, 7 How., 812; 12 L. Ed., 925. It is primarily for each State to say what police regulation it will adopt. In that matter it speaks through its Legislature. It is for the judiciary of that State to declare the legislative intent and meaning of such enactments, and that declaration is the extent and limit of the particular statutes when they come to be applied either by the judiciary or the executive departments of the State government. Sutherland, Stat. Const., section 5. In construing a statute, the aim is of course to arrive at the legislative meaning. The first, and most important rule is to resort to the language of the act itself, and from that language alone, to gather the legislative purpose, if the language used is unambiguous. It is not allow-

able, in such state of case, to resort to any other source of information to learn what the lawmaking department intended, or as to what evils they proposed remedying. If, however, the Legislature has enacted two or more statutes which from their wording appear to be inconsistent, or if the statute under consideration appears to be in conflict with a provision of the Constitution, State or Federal, there is an ambiguity, for it is always presumed that the Legislature did not intend to violate either Constitution; it is always presumed it intended its enactments to become valid and enforceable laws. Nor are repeals by implication favored, as it must be presumed that, if the Legislature had intended that one statute should repeal another, it would have so expressed it as to leave no doubt of its purpose. Hence when two statutes bearing on the same subject appear on their face to be so inconsistent with each other, the first duty of the court called upon to construe them is to harmonize them if possible so as to allow both to stand; or, if that cannot be done without violence to some part of the language employed in one or both the statutes, then the rule is to construe them so that both will stand so far as possible, and wherein any part of either is irreconcilable with any part of the other the latest stands, while the inconsistent part of the former is deemed to have been repealed. Where an ambiguity exists, whether because of that uncertainty of meaning of the words employed, or because of an apparent conflict in statutes, or between a statute and the Constitution, then and then only, are the courts permitted to look beyond words of the particular statute as to the legislative purpose. Such methods of construction are always for the sole purpose of arriving at the legislative intention.

"The last statute is the first to be construed, as it is the latest in date, and as it controls if there is conflict between it and the other statute. Reading it in connection with the act of May 20, 1890, it is perceived the two deal in part with the same subject. When considered literally, they seem to be in

conflict. There then exists an ambiguity, an uncertainty as to what the Legislature intended, as the latter does not expressly repeal the former, nor allude to it in terms. Among the aids to which the court may resort in arriving at the legislative purpose in enacting a statute which is ambiguous, is to look to the evil which it was intended to correct. This may be done by resorting to the history of the times, of which the court will take judicial notice. For two decades or more those commercial combinations of capital and resources for reducing competition in their products so as to realize greater and more certain profits from them, by which monopolies more or less complete have been created, have attracted wide public attention. They have been the subject of considerable discussion in the press, and of a great deal of legislation, both State and national. The question has become one of large importance in political economy. Such combinations have been so frequent, so numerous, and in many instances so gigantic and successful in their purpose, that it is doubted by many publicists whether they can all be entirely, or ought to be entirely, suppressed by law. It is believed by many that they have come to stay, in some form, and mark an era of evolution in commercial matters, which it is impolitic, if not impossible, to wholly prevent. It is not within the province of a court, and certainly not our purpose, to discuss the political features of this subject. But of the existence of these discussions and of the causes leading up to them we must and do take notice. The principal enactment by the congress bearing on this subject is popularly known as the 'Sherman Anti-Trust law,' (Act July 2, 1890, c., 647; 26 Stat., 209; U. S. Comp. St., 1901, p. 3200). All, or nearly all, of the States of the Union have enacted legislation embodying the principal features of the Federal act, more or less, drastic in their measures. It is to be noticed that all of them are kindred in purpose, the object being, broadly stated, to prevent monopolistic oppression. Since the first of these statutes, the measures resorted to by the

several States have from time to time become complex and more stringent. From the nature of the subject, Congress alone could deal adequately and lawfully with that feature of it which falls within the term 'interstate commerce,' while in all other instances the State alone must handle the question. From the general tendency of this legislation, as well as from contemporaneous history, it may be gathered that the efforts of government in dealing with this subject have not been wholly satisfactory, have not been adequate, and that the subject is one about which much has been learned in the various experiments adopted, and some rejected and replaced by others. It is likely we have not yet seen the perfection of any system for adequately dealing with the question.

"That such combinations of the capital and resources of competitors in any business whereby they produce a monopoly with which the public must deal, and by reason of which extortion is practiced upon the public, is admitted everywhere as being highly impolitic, and dangerous in the extreme to the general welfare. Kentucky has taken a part in this general crusade against the evils of the trust. At a time when much similar legislation was being adopted, and when the subject was comparatively new as a legislative venture, this State enacted the act of May 20, 1890, already quoted in this opinion. The terms of that act seems to us to be as comprehensive as it is possible to have made them. The act included every form of combination, by whomsoever entered into in this State, and whatever kind of property, where the object was to 'regulate, control or fix' the price of a commodity, and whether the object was successful or not. Notwithstanding, the evils which it was intended by that act to cure were not materially abated in this State. The statute was upon the books, but the conditions remained the same, or became worse. The effect was that many people of this State were being oppressed, or believed they were being oppressed, by one concern or another operating here in violation of that act.

"But to go back a step. Directly after the passage of the act of May 20, 1890, something like a year after its passage, a convention was called by the popular vote to frame a new Constitution for this State. In the debates leading up to the selection of members of that convention the very evils here discussed were widely canvassed, and from the general scope and spirit of the instrument promulgated by the convention in September of 1891, and ratified by the people, it may be gathered that those evils, and the question of how best and wisely to handle them, engaged the earnest attention of that body. A reference to the debates in the convention (volume 3, pp. 3693, 3706, 3765), discloses that the act of May 20, 1890, and its inefficiency, were fully discussed. Of the many propositions submitted, there was finally adopted the following section, which is now section 198 of the Constitution: 'It shall be the duty of the General Assembly from time to time, as necessity may require, to enact such laws as may be necessary to prevent all trusts, pools, combinations or other organizations, from combining to depreciate below its real value any article, or to enhance the cost of any article above its real value.' That was a step in the other direction in the legislation. It did not evince any purpose to change the public policy of treating monopolistic trusts as evils where they operated oppressively. But it recognized that in dealing with the subject, lest too stringent measures intended to suppress the evil should result injuriously to harmless or even useful combinations, it was expressly provided that the Legislature should, from time to time, as necessity appeared, enact such legislation as would prevent combinations from depreciating commercial property below its real value or enhancing its cost above the real value. Two ideas are prominently advanced in this section: The main one is, that the real value of articles of commerce should obtain in the markets of that State, so far as affected by combinations; the other is, that it was left to the Legislature to determine the best method of obtaining that end, rec-

ognizing that the stage of legislation upon the subject was yet experimental, and that changes would be necessary from time to time to meet the changing conditions of the country.

"It was supposed by some that section 198 of the Constitution repealed the act of May 20, 1890. But not so. This court, in Commonwealth v. Grinstead, 108 Ky., 59; 55 S. W., 720; 57 S. W., 471; 21 Ky. Law Rep., 1444, held that that section of the Constitution and the statute of May 20, 1890, were not inconsistent. On the contrary, it was said in the response to a petition for rehearing, at page 76 of 108 Ky., page 471 of 57 S. W.: 'The requirement that the General Assembly shall "enact such laws as may be necessary to prevent all trusts, pools, etc.," leaves to the Legislature the choice of the legislative machinery to effect the required purpose, and necessarily some discretion as to how much machinery will be required to be effective. Both the means to be employed and the extent to which they are to be employed are committed to the discretion of the Legislature; and if, in order to prevent combinations to depreciate, or enhance an article below or above its real value, it is necessary to enact laws to prevent all combinations to fix prices, that is a detail of the necessary legislation required.' It was further said that the Legislature had refrained from other legislation for the accomplishment of the requirement of the Constitution upon the assumption that the previous act left in force was best calculated to effectuate that purpose.

"The evils intended to be suppressed by the Constitution and the statute of 1890 were unabated. Conditions had grown up where the agricultural class in particular were being made the victims of such combinations. The method was, those who bought many of their products formed pools or trusts, so that there was left but a single buyer in effect; while those who sold them many articles needful in the pursuit of their business formed combinations, so that there was but a single seller in effect. As the competition previously existing among the

farmers' customers for certain of his products was destroyed by these combinations, he was forced to sell at his sole customers' price. Or, when he came to buy from the trust manufacturer, he had to buy at the seller's price, fixed without competition. The result was that in the one instance commodities were depreciated below their real value, while in the other they were enhanced above their real value. It was with this aggravated situation that the Legislature came to deal in 1906. It was conceived that, inasmuch as the most stringent laws did not effectually prevent unlawful combinations of capital and resources, it would have a tendency to counteract this evil to put it in the power of those against whom it was operating principally to protect themselves by combining their products, so that by classifying, grading, and handling them in large bulks it would materially affect the general market of such commodities, and better prices would be realized in spite of the fact that there was but one buyer practically. Hence the act of March 21, 1906. It is now contended by appellee that that act allows the farmer to do precisely what his adversary has been doing, and which under the statute of 1890 was a crime. The same argument was advanced in the case of Owen County Burley Tobacco Society v. Brumback, etc., 107 S. W., 710; 32 Ky. Law Rep., 916; which was a proceeding before Judge Carroll of this court to dissolve an injunction. Sitting with Judge Carroll in considering the validity and scope of the act of March 21, 1906, here involved, were all of the Judges of this Court, with the exception of the writer of this opinion, who was absent. The opinion delivered by Judge Carroll may be said to reflect the views of at least a majority of the court. And in those views I desire now to express my concurrence. Construing the act of 1906, Judge Carroll said: 'The act, although confining the privilege granted by it to farmers, does not in terms prohibit other persons or corporations from pooling their products, or from pledging them to an agent to dispose of. * * * * If this act undertook to confer upon

farmers the exclusive privileges of combining and pooling their crops to the end that a greater price might be obtained therefor, and expressly denied to other classes or persons the right to combine or pool their products for the same purpose, or if it should be so construed, it is plain that it would be in direct violation, not only of section 3 of the Bill of Rights, but of the fourteenth amendment of the Constitution of the United States.' In the same opinion, construing section 198 of the Constitution and this statute of 1906, it was said: 'To put it in another way, it would seem that, so far as this section is concerned, trusts, pools and combinations, the only purpose of which is to obtain a fair and reasonable price for an article, are permitted. The Legislature could not enact a law legalizing a pool or combination of persons for the purpose of enhancing the cost of any article above its real value, yet it may legalize such pool or combinations as are created or organized for the purpose of obtaining fair and remunerative prices. * * * * The act of 1906 does not authorize or permit a pool or combination to enhance the cost of crops above their real value. This is not the proper construction, and, if it allowed owners to place the price of their crops above their real value, it would clearly be a violation of the Constitution.'

"State Constitutions are limitations of power. While a Legislature may enact any statute not prohibited by the organized law, when it reaches that limit it must stop. It was because of that fundamental principle that it was said in the opinion last quoted from, that the Legislature was without power to authorize any set of men to enter into a combination to sell their combined property at greater than its real value. Looking again to that rule of statutory construction which presumes that the Legislature did not intend to enact a void statute, but that it intended to comply with the Constitution, it was also held in the case just cited that the legislative purposes was to 'enable the farmers to combine their resources and place their property in the hands of

an agent selected by them, to the end that better prices might be obtained,' but not 'for the purpose of enhancing the price of an article above its real value.' That construction of the act of 1906 the court now adopts.

"But if it should be conceded that the actual purpose of the Legislature was to authorize farmers to pool their property so as to get for it as much, and if possible more, than its real value, and holding as we do, that such purpose would be in contravention of section 198 of the Constitution as to the latter purpose, still the act of 1906 would not be a nullity. So far as it was within the legislative power, it would be upheld, and the excess alone would be held invalid. An act of the Legislature of this State created the office of Prison Commissioners, defined their powers and duties and mode of selection, and fixed their term of office at six years. The Constitution forbade the creation of any office by the Legislature with a term longer than four years. The validity of the act came before this court for determination in **Commissioners of Sinking Fund v. George, etc.**, 104 Ky., 260; 47 S. W., 779; 20 Ky. Law Rep., 938; 84 Am. St. Rep., 454. It was held that the attempt to exceed the limit imposed by the Constitution was void, but that the excess would be rejected, and the act in all other particulars was upheld, subject to that modification.

"Construing the act of 1906 in consonance with section 1908 of the Constitution, the question, then is, what is its effect upon the act of 1890? When two or more statutes are enacted at different sessions of the Legislature, all having the same subject, the rule is, they are to be treated in *pari materia*. It is thus stated in Sutherland on Statutory Construction, section 238: 'One who contends that a section of an act must not be read literally must be able to show one of two things: Either that there is some other section which cuts down or expends its meaning, or else the section itself is repugnant to the general purview. The question for the court is, what did the Legislature really intend to direct?

and this intention must be sought in the whole of the act, taken together, and other acts in *pari materia*.' It is not the custom of Legislatures to declare their purposes as such. Legislation is usually enacted from time to time bearing on particular subjects. The courts presume that the Legislature intended all its enactments on a given subject to constitute a consistent treatment within constitutional limitations of the whole subject. Provisions of the Constitutions are therefore to be read in conjunction with such statutes, and all of them, the provisions of the Constitutions, State and Federal, and the several enactments of the Legislature, will be treated as a harmonious, consistent system, in preference to supposing that, literally construed, one is repugnant to the others, and some enactments in consequence wholly fail.

"As, then, the Legislature had left the act of 1890 upon the statute books, and had enacted the one of 1906, upon the same subject, meaning by it to confer the right upon some to pool their property for the purpose and to the extent not forbidden by section 198 of the Constitution, we must construe these two statutes and the section of the Constitution together. And, in doing so, we must take into view the fourteenth amendment to the Constitution of the United States, as it also was presumably in the legislative mind in enacting the last statute. If it be construed that the Legislature intended a discrimination between farmers and all others, their enactment would be void. We must reject the view of it, if any other can be made to apply. If, however, it be construed that the act of 1906 operates to confer upon all persons the same benefits, as was intimated in the opinion in Owen County Burley Tobacco Society v. Brumback, supra, then there is no discrimination as that construction is possible under the language employed, and as it would sustain the validity of the act it must be adopted. It therefore follows that appellee and all others have the right under the existing laws in Kentucky to pool their property, or combine their capital and other re-

sources, so as to get no more than the real value of their property when sold in the market.

"But if it should be conceded that the legislative purpose was not to confer upon all others the benefits expressly given to farmers by the act of 1906, what would be the result? An attempted discrimination would result, it is true, but it would be ineffectual as a law because of the operation of the fourteenth amendment to the Constitution. The article does not prohibit the State from enacting any measure it chooses favorable to any class of persons within its jurisdiction. Its effect is to act automatically upon the laws of the State, not to annul the State statute conferring benefits, but to raise the complainant class to the same level as that enjoyed by the favored class, securing to all the same benefits. A familiar application of this principle is in its invocation for the relief of persons of African descent from the effect of discriminatory statutes in their trial by jury. A single case will illustrate the application. In West Virginia a statute made white male persons alone eligible to jury service. A negro arraigned for a crime before a court of that State raised the question of the right of the State to try him by a jury impaneled under that statute. The Supreme Court held (Strauder v. West Virginia, 100 U. S., 303; 25 L. Ed., 664), that the State statute operated as a discrimination. It did not hold, though, that the negro could not be tried at all because of that fact, or that West Virginia was, because of the repugnance of its statute to the fourteenth amendment of the Constitution of the United States, without any statute on the subject of who was eligible to jury service in the courts of that State; But it held that members of the race discriminated against were, by operation of the amendment, entitled to the same legal privileges as to jury service that the more favored race was given by the laws of the State. It did not reduce the rights of the favored class to the plane attempted to be restricted to the unfavored one, but it elevated the lower to the level of the higher. Upon the same principle, the effect of the amendment upon the legislation in Kentucky against

pools and trusts is not to efface all the enactments because they were discriminatory, if they were, but is to give to every one all the benefits conferred upon any one. The result would be the same as if, by construction as to the intention of the Legislature in enactment the statute of 1906, it was held by the courts of this State that the Legislature proposed giving all the benefits of that act to all persons, whether expressly named or not, and to that extent only had repealed or rather amended the act of 1890.

"Appellee relies upon the opinion in Connolly v. Union Sewer Pipe Co., 184 U. S., 540; 22 Sup. Ct., 431; 46 L. Ed., 679, as sustaining the lower court in holding the act of 1890 void because of the subsequest act of 1906. In the Connolly case, Illinois had enacted a drastic anti-trust statute, but in one section excluded agriculturists from its effect altogether. No right was by the statute conferred upon the farmers. On the contrary that was made a crime if done by any person other than a farmer. The statute was not severable. Any combination, except that by farmers of the products of their farms, was penalized. There was no room in the statute for any construction save that of an attempted purposeful discrimination as against all others than farmers. The Supreme Court held that under the operation of the fourteenth amendment all others were entitled to the same protection by the laws of Illinois as the farmers were. As there was no instance in which the farmer who pooled his farm products would be punishable, it followed that in no instance could others be punished under the State statute for pooling their products. There is a wide difference between that case and the situation we have in hand here. We say that both our statutes apply to the farmer as well as to others, and that both apply to others equally with farmers. There is no discrimination in intent, or in effect, as the statutes are construed and applied."

In Commonwealth vs. Hodges, 137 Kentucky, beginning on page 233, the question involved was whether the

act of March 13, 1908, was unconstitutional. The opinion in this case was delivered by Commissioner Clay.

It might be said in explanation that the Commissioner of the Court of Appeals of Kentucky is appointed by the Judges of the Court of Appeals. His duties are to take such cases as are assigned to him by the Chief Justice, and prepare an opinion and then submit the record and the opinion to the court, and if the court approves the opinion, it becomes the opinion of the court, although delivered by the Commissioner. So the opinion in the Hodges case is the unanimous opinion of the Court of Appeals.

Hodges and one West were indicted for the offense of unlawfully purchasing pooled tobacco. A demurrer was sustained in the lower court to the indictment and the indictment dismissed. From the judgment of dismissal the Commonwealth appealed. It was insisted that the act was invalid because a discrimination in favor of one class of purchasers, to-wit, the farmers, and against another class, to-wit, the manufacturers. The court in its opinion said:

> "Before proceeding to discuss the questions raised on this appeal, it will be necessary to refer to certain decisions of this court bearing upon the validity and interpretation of the act of 1906. (That is March 21, 1906).
>
> "The case of Owen County Burley Tobacco Society, et al. v. Brumbach, et al., 128 Ky., wherein the opinion was delivered by Judge Carroll, but concurred in by the other members of the court, it was held that the act of 1906 in allowing a class of persons to make contracts with others, the intent of which was to pool and combine their tobacco or other farm products, and to select an agent to handle, hold and sell such pooled crops to obtain higher prices than could be received by selling the crops individually, did not violate section 198 of the Constitution for the reason that it did not authorize a pool to en-

hance the cost of crops above their real value, but was simply intended to enable the class affected to meet the trusts that controlled the markets in which the farmer was forced to sell and to place him on such footing that he might secure a fair and reasonable price for his crops. It was further held, however, that if under the act farmers should combine and pool their crops for the purpose of obtaining a greater price than the real value thereof, and it should be judicially determined that such was the case, the contract would be invalid and without binding force upon one who entered into it, even though he did so voluntarily. It was also held that the act did not violate section 3 of the Bill of Rights for the reason that while it confers upon a class certain privileges, it does not withhold the enjoyment of those privileges from others. For the same reason it was held that the act did not violate the fourteenth amendment to the Constitution of the United States."

The court, referring to case of Commonwealth vs. International Harvester Company, 131 Ky., 551, supra, on page 241, uses the following language:

"In that case it was insisted that the defendant was denied the equal protection of the laws guaranteed by the fourteenth amendment to the Constitution of the United States for the reason that it was made a crime for it to do the very thing which the farmers were permitted to do by the act of 1906. *This Court, in an exhaustive opinion, approved the views expressed by Judge Carroll in Owen County Burley Tobacco Society v. Brumbach, supra, and held that the effect of the act of* 1906, *when considered in connection with the act of* 1890, *section* 198 *of the Constitution, and the fourteenth amendment to the Constitution of the United States was to confer not only upon the farmer, but upon all others, the right to pool their products, skill or capital for the purpose of obtaining the real value thereof.*"

And the Court of Appeals in the Bullitt County case, referring to the Federal question raised by demurrer says:

> "It is sufficient to say that it was decided adversely to appellant's contention in the case of the Commonwealth v. International Harvester Co., 131 Ky., 551, and we adhere to that ruling.
>
> "Indeed, by the opinion in that case it was not only held that the sections, supra, were not in conflict with the fourteenth amendment to the Federal Constitution, but that by construing section 3941a as an amendment to section 3915, as was evidently intended by the Legislature they could properly be and were harmonized. In effect the same conclusion had been arrived at by the court in the previous case of Owen County Burley Tobacco Society v. Brumbach, 128 Ky., 137.
>
> "*It may be said that since these two cases were decided, there is no law in this State which forbids the existence of trust pools or combinations, or that prohibits them from fixing and maintaining the price or prices of their products or commodities, so long as they are not sold for more nor less than their real or market value.*"

(Page 163, Transcript, of Bullitt County Record.)

From these quotations it is so plain that no one can be mistaken therein, that under the laws of Kentucky prior to the institution of the instant cases, and upon which they were based, it was no offense to form a pool, trust or combination for the purpose of receiving a higher price for the commodity or article pooled, or concerning which the combination or trust was formed. Trusts, pools and combinations may be formed for the purpose of selling manufactured articles or agricultural products at a higher price than before the combination, and carried out by actual sale at a higher price. The law only prohibits a trust or combination formed for the

purpose of selling the manufactured articles or agricultural products at a price in excess of their real or market value. This is all the laws of Kentucky prohibit.

The manufacturer of articles has identically the same right, and no more, than those engaged in growing agricultural products. The farmer has, under the Kentucky laws, no greater privilege than the manufacturer. Each is given the equal protection of equal laws and the same prohibitions apply to each. There is no discrimination under the Kentucky Statutes in favor of the one or against the other. There is not in a decision of the Court of Appeals of Kentucky a single line or word from which it could be reasonably inferred that any discrimination was permissible between the producer of manufactured articles and the producer of agricultural products. There is not in the history of legislation or court procedure in Kentucky a single act or a single case where this character of discrimination was endorsed or permitted, and the record of the Grayson County case discloses that plaintiff in error (defendant in that case) by its special plea, found on pages 9 and 10, of Grayson County Transcript of Record, made the charge that there had been discrimination in favor of the owners of products described in the act of March 21, 1906, to-wit, farmers, and against manufacturers. This was positively denied by the reply to this plea filed on behalf of the Commonwealth, which will be found on pages 11, 12 and 13 of the record, and plaintiff in error was called upon to submit to the officers of the law any knowledge it had of any combination formed for the purpose of increasing the price of farm products, or any products mentioned in the act of 1906, above their real value, and the Commonwealth of Kentucky pledged itself, if such proof was produced, to institute prosecutions against such combination or combinations, but the plaintiff in error, although given full opportunity to do so,

failed to introduce or attempt to introduce any testimony showing such discrimination, and failed to convey to the proper authorities of Kentucky any information it might have concerning such combination.

The only inference that can be drawn from its failure to offer testimony or information when called upon to do so, is that it had neither, and the reasonable inference further is that its only purpose in making such charges now in its argument before this Court is to divert attention from its own misconduct by making unwarranted charges against the constituted authorities of the State of Kentucky.

Plaintiff in error in the Bullitt and Todd County cases assigns as one ground of its demurrer:

> "That the Act of May 20, 1890 * * * * under which this proceeding is prosecuted or instituted, as set forth in the petition filed herein, must be considered and read in connection with the Act approved March 21, 1906, entitled 'An Act permitting persons to combine and pool their crops of wheat, tobacco and other products and sell the same as a whole and make contracts in pursuance thereof, valid,' and when read, taken or construed in connection with said act of March 21, 1906, the said act of May 20, 1890, denies to it and to other persons within the State of Kentucky the equal protection of the law, because in violation of the fourteenth amendment of the Constitution of the United States, and is void."

The decisions of our Court of Appeals construing those laws show that all parties are given the equal protection of the law and this complaint of plaintiff in error has no foundation.

STANDARD ADOPTED TO DETERMINE WHETHER OR NOT THERE HAS BEEN A VIOLATION OF THE KENTUCKY ANTI-TRUST LAW IS FIXED AND CERTAIN.

The second and last ground of demurrer of the plaintiff in error in the Bullitt and Todd County cases is as follows:

> "And this defendant assigns as further ground of demurrer herein; that the said act of May 20, 1890, as construed by the Court of Appeals of Kentucky fails to provide or establish any fixed standard or criterion by which to determine what was or is the real value of the article and machine herein alleged to have been sold by the defendant, and is in violation of the said fourteenth amendment of the Constitution of the United States, in that it permits this defendant and other persons and corporations within this State to be deprived of their property without due process of law and is void."

This demurrer raises the question as to whether or not there is any fixed standard to determine what the real value of the article or machine sold and for the selling of which the plaintiff in error has been prosecuted.

The "real value" as used in Section 198 of the Constitution, means the market value. In International Harvester Company of America vs. Commonwealth, 131 Ky., 576, the Court of Appeals of Kentucky says:

> "'Real value' spoken of by the Constitution, (Section 198) is the market value."

Again, in case of International Harvester Company of America vs. Commonwealth, 137 Ky., page 677, the Court of Appeals of Kentucky says:

> "Under fair competition and under normal conditions, the market value of a commercial commodity is its real value. It is that value that our legislation aimed to preserve."

In case of International Harvester Company of America vs. Commonwealth reported in 147 Ky., 564, and being the opinion in the Bullitt County case, the Court of Appeals said:

> "Obviously the real value of any marketable commodity is its market value under fair competition, and under normal market conditions." (Page 163, Transcript of Record, Bullitt County case.)

So we have it settled, under the decisions of the Court of Appeals of Kentucky, that the real value of the article is its market value. It is contended that this value is so uncertain that no fixed standard is established. Upon this question the Court of Appeals, in case of Commonwealth vs. International Harvester Company, 131 Ky., from pages 574 to 579, inclusive, speaks as follows:

> "A final objection is urged against the construction being applied to these statutes, that, when read in conjunction with section 198 of the Constitution, as we have held they now must be, there is such uncertainty in them as to what constitutes a breach of the statutes as to render them void. This is supposed to be so, because, it is argued there is no way of establishing the "real value" of an article that is fixed and certain; that one jury might say upon a state of facts that the accused was guilty, while another jury upon the same facts would pronounce not guilty; that the accused ought not in justice to be left in such uncertainty as to the state of law, as to whether the law made his act a crime. The opinion in L. & N. R. R. Co. v. Commonwealth, 99 Ky., 132;

35 S. W., 129; 33 L. R. A., 209; 59 Am. St. Rep., 457, is relied on. Section 816, Ky. Stats., 1903, made it an offense for any railroad to charge or receive 'more than a just and reasonable rate of toll' for the transportation of freight or passengers. That appellant railroad was indicted for having violated this statute. In holding the statute to be unconstitutional, this court said: 'There is no standard whatever fixed by the statute, or attempted to be fixed, by which the carrier may regulate its conduct; and it seems clear to us to be utterly repugnant to our system of laws to punish a person for an act, the criminality of which depends, not on any standard erected by the law which may be known in advance, but on one erected by a jury, and especially so as that standard must be variable and uncertain as the views of different juries may suggest, and as to which nothing can be known until after the commission of the crime.' We are not disposed in this case to overrule or pinch away from any adjudged case of this court in order to sustain the conclusion at which we have arrived nor to indulge in over nice distinctions. The principle announced in the L. & N. R. R. Co. v. Commonwealth, supra, may be literally applied with safety to these acts without impairing their validity in the least, or disturbing the full authority of that opinion. It will be noticed that it is not the uncerainty of what the juries may do in a case, nor the uncertainty of the courts, nor the uncertainty of the character of evidence upon which verdicts may be found, but it is the uncertainty 'of the standard erected by law' that is the test.

"There is a marked difference between the qualities of the 'real value' of an article and 'reasonable compensation' for a service. The latter may depend alone upon the opinion of the trier of the fact; the former is itself a fact susceptible of proof and exact ascertainment. It is not an open question in the criminal law of the land. For example, the larceny of a chattel worth less than $20.00 is in this State a misdemeanor; if more than $20.00 in value, it is a felony. Different juries might form different

conclusions, upon the same facts. What they might do is proverbially uncertain. Nevertheless the 'standard erected by law' is not uncertain; it is the market value of the thing taken. So, hog stealing is a felony in this State, (Section 1196, Ky., Stats., 1903), if the hog taken is worth $4.00 or more. A hog worth $4.00 in the market where taken might have been worth only $3.00 the day before, or $3.00 the day after. The market may be fluctuating and uncertain, and the evidence being the opinion of witnesses dependent upon their memories, their opportunity of knowledge, their competency to form a correct judgment, might be even more uncertain. 'Nevertheless, the standard erected by law' is not uncertain. The 'real value' spoken of by the Constitution, section 188) is the market value. The words were used as to things to be sold and bought. It was known, of course, that sellers try to get the highest price, and buyers want to buy at the lowest price; that supply, demand, and competition are the principle factors in regulating prices. Where the conditions are natural, the open market would show the real value of any commodity. Where they are not natural, where either supply, demand, or competition are eliminated, or so controlled as to prevent its operation upon the market, then the commodity may or may not realize its real value. On the other hand, over supply would reduce the selling value to a level below the normal. If a concerted action of producers resulted in only a normal supply of a commodity reaching the market, the normal demand would maintain normal prices. Such action is necessary, or at least seems wise both as it affects the producer and the general public. Violent depressions of a market that result in heavy losses are hurtful to everybody, because they tend to disturb the natural equilibrium of business, and reflect harmfully, or are likely to, upon every other branch of commerce. The general public can not be benefited by disaster to any legitimate business. Conditions that are stable, assuring and reasonably profitable are best for everybody. The object of the

government should be to foster such conditions so far as within its power. Indeed, it is the unsettling of these conditions by one set of men who by their combined force break them down at some point, by oppressing their adversary in the business, bringing ruin upon him that they may gather extraordinary profits, that is the main evil of the so-called "trusts," and the one which the legislation we are now considering aimed to correct.

"When the law endeavors to maintain the real value of an article, it has in contemplation the value of the thing as sold under ordinary, normal conditions, unaffected by any combination of producers or dealers, whose object is to create an abnormal condition in that market. If it is argued that this is difficult of proof and uncertain, it must be answered that the difficulty of proving the existence of a fact cannot be urged against the propriety of its being established. Nor is the standard uncertain. What the state of a market was immediately before an act, how it was affected by that act, the quantity of the commodity within reach of the market, the normal—that is, the usual—demand for it, are all facts susceptible of proof. They are in fact acted upon every day in the commercial affairs of the world; large business ventures are launched in reliance upon that identical evidence, and in truth, upon it all commerce depends and is conducted. It is idle to say that that which everybody out of court can know, and does act upon as a fact, is too uncertain to be adopted as a standard, or be susceptible of proof in court. What the 'real value' of a thing is, depends upon probative facts; it is a matter not to be fixed, as is 'just and reasonable compensation,' but one that has already been established by markets open to all. Market value depends wholly upon proof of pre-existing facts, and therefore, may be known at any moment by anybody. 'Just and reasonable compensation,' as used in the statute in the L. & N. R. R. Company case, supra, had no necessary connection with any pre-existing fact, and therefore was

insusceptible of being known in advance of its determination by the jury.

"The application of this principle in law is not new. The Romans had laws based upon it. In 5 and 6 Ed. VI., a statute was passed punishing 'forestalling and regrating,' the first being the buying of merchandise or victual coming to market, or dissuading persons from bringing their goods or provisions there, and the latter was the buying of corn, or other dead victuals in any market, and selling it again in the same market, or within four miles of the place. 'Engrossing' was described to be getting into one's possession, or buying up, large quantities of corn or other dead victuals, with intent to sell them again,' Bl. Com., 155. That statute was repealed in the twelfth year of George III. But Wharton in his Criminal Law says: 'Entirely apart from these statutes, we must hold it to be indictable, on general principles of common law, to engross and absorb any particular necessary stable or constituent of life so as to impoverish and distress the mass of the community for the purpose of extorting, by terror or other coercive means, prices greatly above the real value.' Wharton, Criminal Law, 1851. In Hale's Pl. C. c., 80, it is laid down that to absorb, by fraud or coercion, all of a particular class of staples, or currency, or labor in a community, so as to produce a dearth in any actual necessity of life, and in this way produce misery on one side and extortionate gains on the other, is undoubtedly an indictable offense. The common law confined the offense to an absorbtion of the necessities of life, whereas our statutes extend the principle to all articles of commerce; the common law made the crime depend upon the actors using fraud or coercion, while our statutes leave out those ingredients, as the act itself in its necessary effect is hurtful to society, and must have been known and intended by the perpetrators to be so; at the common law the result must have produced a dearth and misery upon a mass of people, while by our statutes it is enough if the result unsettles the usual balance of the market in that commodity, it being considered that in such state

of case misery will be brought upon some members of society, and they are deemed by modern legislators as sufficiently important to the well-being of the whole body of the people as to warrant their protection; at the common law the final test was if the result brought the prices of the commodities greatly above their 'real value,' while under our statutes if the price is enhanced above or reduced below the 'real value' the offense is complete. It was competent and possible, then, to show the real value of corn and other necessities of life, and it is equally competent in law now to show the real value of any commercial commodity, and it is perhaps easier to prove the fact now than it was then."

In the case of International Harvester Company of America vs. Commonwealth, 137 Ky., 677, the Court of Appeals of Kentucky uses the following language:

"A number of witnesses were introduced who testified that prior to 1906 they, as dealers in harvesting machinery in Logan County, bought harvesters and their parts from the Deering Company, the Osborne Company, the Milwaukee, and the Champion, from each, its own product; that since 1906 they had bought these same machines all from the International Harvester Company of America; that prior to 1906 there was sharp competition among the dealers and manufacturers; that since 1906 the sales were to the retail dealers, who were at liberty to sell the machines at any price they saw fit; that since appellant sold all the machines, the price had enhanced about five per cent. Appellant offered to prove that the price of the iron, steel, wood, and labor had all increased more than five per cent during the same time, as well as that prices of manufactured articles generally had similarly increased, but the trial court rejected the evidence. There was no evidence offered to show at what price the machines sold, either before or since the alleged combination of the manufacturers. There was not evidence offered to show the real value of the machines,

unless it be said that the market price prevailing just before the combination charged tended to show such values. Under fair competition, and under normal conditions, the market value of commercial commodities is its real value. It is that value that our legislation aimed to preserve. That value will increase or diminish according to the fluctuations of the market values of its ingredients, or the price of labor which produces it; or by improved or cheaper methods of producing, or by cheaper means of transportation; or by the invention or discovery of other products which are or may be used in lieu of the particular one; or by the increase or decrease of sources of supply and demand. Must the prosecution by its evidence establish the existence or nonexistence of all the conditions naturally affecting market values of the article in question, before it can be said to have sustained its charge? Under fair competition and normal conditions, the so-called 'law of supply and demand,' and the interest of producers to protect their own so as to prevent loss and to secure a fair profit, may be depended on to regulate the price of the thing. They have always done so under those conditions. When there are two or more producers of the same articles, supplying the same market, without any understanding or agreement between them to regulate the price of their product so as to get more for it than they would get if each pursued his own course, and when there is a like state of affairs among the consumers of that article, competition may be said to be fair; and when there is an absence of such abnormalities as panics, widespread strikes, wars, and such, the conditions may be said to be normal. When, therefore, the prosecution shows (1) that there has been a combination among all or any of the producers of a commodity of merchandise, by which its output is restricted or controlled alone by the confederates in the scheme; (2) that the market price of the article was then materially enhanced; (3) that the conditions affecting commerce in general are normal; (4) that the competition otherwise than for the com-

bination complained of would be fair—there would be established prima facie a case of violation of the statute.

"It is not true that all combinations of producers are illegal, or ever are wrong or hurtful. Co-operation is as essential in many kinds of business as is competition. In nearly every business it is practiced, and has been in some form or other since society was organized. The legislative action was not aimed to prevent co-operation. It was aimed against monopoly. Therefore it is not enough, under a prosecution under our statute, to show that there has been a combination among producers of their products or plants. Human nature is such that we must know the combination was intended to improve the affairs of those entering into it. They expected to make more money out of it than they made before. That is the spur of all commerce, and it would be unwise policy that took it away. Nor is it enough to show in addition, and no more, that prices of the commodity were subsequently advanced. It may have been that the prices before were not high enough to pay the producers a living profit—though that is scarcely likely, else, save in exceptional callings, they would not have been engaged in the business where there was a choice left them to engage in some other. It is necessary to show that the general conditions affecting the market of that commodity were normal, and that but for the combination complained of the competition would have been fair; that is, natural and usual. Then the burden would shift to the defense to show such exceptional conditions affecting the particular commodity as naturally tended to produce the increase in market price which the prosecution had proved; such, for example, as that the cost of labor, or of the ingredients or constituent parts, or of transportation, or any other particular matter peculiarly within the defendant's knowledge, which legitimately affected the selling price of the article as compared with its previous selling price. The everlasting conflict between seller and buyer is as old as the race, as well

as world-wide. A jury knows it as well and is as competent to apply the law of its existence, as perhaps, any other practicable tribunal under our government. The jurors will know that, without combinations, prices, will fluctuate as they may be affected by innumerable causes. They know this, as they know the most common experiences of life. They know, too, that if there is but one seller and many buyers, the former will get more than an equitable price for his product. They know that a combination among all, or a very considerable number of sellers, whereby the situation is made equivalent to there being but one seller, the many buyers are more than apt to suffer. The statute is thrust in between such unconscionable purposes and the otherwise helpless buyers."

Again, in 144 Ky., in case of International Harvester Company of America vs. Commonwealth, on pages 410 and 411, the Court uses the following language:

"In addition to showing that the combination was entered into, and that it had for its purpose the fixing, regulating or controlling of prices, the Commonwealth must show that the effect of the combination was as expressed in section 198 of the Constitution: 'To depreciate below its real value any article, or to enhance the cost of any article above its real value.' Whether or not the Commonwealth succeeded in making out a case upon this essential point, presents the only difficult question in the record. So many factors enter into its solution that it is not easy to determine when the price of an article has been enhanced above its real value as it is contended the price of machines were. The condition of the market, the character of the article; the use to which it is put, the demand for it, the price of labor and material, the cost of production and the expense of selling are some of the things that are to be considered in fixing the price. And as the appellant corporation and the machine companies that

are a part of the combination have their factories in other States, the difficulty in procuring evidence on the part of the Commonwealth that might throw light upon some or all of those questions can be easily appreciated. But the facts that the combination was formed in connection with the legal presumption that it was formed for the purpose of fixing, and controlling prices is sufficient to show in the absence of countervailing evidence that an advance in the price prevailing before the combination was entered into, enhanced the price of the article above its real value, if market conditions before and after the advance were substantially the same and the cost of production had not materially increased, or in proportion to the advance. And so we think that in prosecutions under the Statute, when the Commonwealth has shown by evidence and legal presumption the combination to fix, control and regulate prices, that evidence of an advance in prices before the combination under substantially the same market conditions that existed before the advance, is sufficient to sustain a verdict of guilty in the absence of evidence that the advance was justified by changed market conditions or a corresponding increase in the cost of production."

From those opinions it is perfectly manifest that those statutes, as construed by the Court of Appeals, provide that if a combination is formed for the purpose of increasing the price of the article above its real value, then the combination is an illegal one. If the purpose of the combination is to depreciate the price of the article below its real value, then the combination is illegal. The standard fixed is the real value of the article. The real value, as stated by the Court of Appeals of Kentucky, International Harvester Company of America vs. Commonwealth, 137 Ky., 551, and in same case, 144 Ky., page 403, is the market value. How is the

market value determined? By the value of the article upon an open market. Where there is no open market for a particular article by reason of combination and agreements concerning same, how can the market value of such article be ascertained at such time?

The Court of Appeals of Kentucky in International Harvester Company of America vs. Commonwealth, 137 Ky., page 551, and same case in 144 Ky., page 403, says the market value may be ascertained under such circumstances by first ascertaining the price before the combination in an open market. This is the market value. Then, if after the combination, the price has been increased without a corresponding increase in the price of labor required in the manufacture or raising of the article, or a corresponding increase in the price of the raw material going into the article (if a manufactured product) and the business conditions are normal, then the increase in price is above the market value.

If the charge is that the price is below the market value, the standard is determined by finding whether there has been a decrease in the cost of labor, etc., corresponding with the decrease in price of the article and whether the business conditions are normal. If there has been no decrease in price of labor, etc., and conditions are normal, then it may properly be concluded the price of the article is below its market value.

In this way the standard is definitely fixed and while, as said in Commonwealth vs. International Harvester Co., 131 Ky., 551, "Different juries might form different conclusions upon the same facts, what they might do is proverbially uncertain, nevertheless, the 'standard erected by law' is not uncertain."

When we consider Section 198 of the State Constitution and the laws upon which those prosecutions are based, as construed by the court of last resort in Kentucky, by whose construction we are bound, we must con-

clude: (1) That the statute makes no discrimination between individuals or corporations, the manufacturer or the agricultural producer; that it denies to no person the equal protection of the law, and gives to each person and corporation the equal protection of the law, and does not in this respect violate the Fourteenth Amendment of the Constitution of the United States. (2) That under the construction placed upon the Kentucky Statutes by the court of last resort in Kentucky, a fixed standard is established to determine the real value of any article, either manufactured or grown, the method of arriving at the market value is made plain and is susceptible of proof, and the statutes cannot be held to be in violation of the Fourteenth Amendment of the Constitution of the United States upon this question.

The policy adopted by Kentucky to regulate this question is one for its determination alone, and that policy has a reasonable relation to the purpose intended, and that policy is not subject to general review.

In Otis & Gassman vs. Parker, 187 U. S., page 605, 47 L. Ed., 323, the following language was used by Mr. Justice Holmes on page 327 L. Ed. of the opinion:

> "It is true, no doubt, that neither a State Legislature nor a State Constitution can interfere arbitrarily with private business or transactions, and that the mere fact that an enactment purports to be for the protection of public safety, health, or morals, is not conclusive upon the courts. Mulgler v. Kansas, 123 U. S., 623, 661; 31 L. Ed., 205, 210; 8 Sup. Ct. Rep., 273; Lawton v. Steele, 152 U. S., 133, 137, 38 L. Ed., 385, 388; 14 Sup. Ct. Rep., 499. But general propositions do not carry us far. While the courts must exercise a judgment of their own, it by no means is true that every law is void which may seem to the judges who pass upon it excessive, unsuited to its ostensible end, or based upon conceptions of morality with which they disagree. Considerable

latitude must be allowed for difference of view, as well as for possible peculiar conditions which this court can know but imperfectly, if at all. Otherwise a constitution, instead of embodying only relatively fundamental rules of right, as generally understood by all English speaking communities, would become the partisan of a particular set of ethical or economical opinions, which by no means are held *semper ubique et al omnibus.*

"Even if the provision before us shall seem to us not to have been justified by the circumstances locally existing in California at the time when it was passed, it is shown by its adoption to have, expressed a deep seated conviction on the part of the people concerned as to what that policy required. Such a deep-seated conviction is entitled to great respect. If the State thinks that an admitted evil cannot be prevented except by prohibiting a calling or transaction not in itself necessarily objectionable, the court can not interfere, unless, in looking at the substance of the matter, they can see that it 'is a clear, unmistakable infringement of right secured by the fundamental law.' "

And again, in Chicago B. & Q. R. Co. vs. McGuire, 219 U. S., 547, beginning on page 55 L. Ed., 339, the Supreme Court of the United States, through Mr. Justice Hughes, uses the following language on page 339.

"The principles involved in these decisions are that where the legislative action is arbitrary and has no reasonable relation to a purpose which it is competent for government to effect, the Legislature transcends the limit of its power in interfering with liberty of contract; but where there is a reasonable relation to an object within the governmental authority, the exercise of the legislative discretion is not subject to judicial review. The scope of judicial inquiry in deciding the question of *power* is not to be confused with the scope of legislative considerations

in dealing with the matter of *policy*. Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether in short, the legislative discretion was in its prescribed limits should be exercised in a particular manner, are matters for the judgment of the Legislature, and the earnest conflict of serious opinions does not suffice to bring them within the range of judicial cognizance."

The principle was thus stated in McLean vs. Arkansas, 211 U. S., 539, pp. 547 and 548:

"The Legislature, being familiar with local conditions, is, primarily, the judge of the necessity of such enactments. The mere fact that a court may differ with the Legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference, unless the act in question is unmistakably and palpably in excess of the legislative power (Cases cited). * * * If there existed a condition of affairs concerning which the Legislature of the State, exercising its conceded right to enact laws for the protection of the health, safety or welfare of the people, might pass the law, it must be sustained; if such action was arbitrary interference with the right to contract or carry on business, and having no just relation to the protection of the public within the scope of legislative power, the act must fall."

Again, in Hunter vs. Pittsburg, 207 United States, 176, where the consideration of an act of the Pennsylvania Legislature was in question, this Court, on page 176, uses the following language:

"Some parts of the assignments of error and of the argument in support of them, may be quickly disposed of by the application of well settled principles. We have nothing to do with the policy, wis-

dom, justice, or fairness of the act under consideration. Those questions are for the consideration of those to whom the State has entrusted its legislative power and their determination of them is not subject to review or criticism in this court."

COMMENTS ON BRIEF OF PLAINTIFF IN ERROR.

We hope we have sufficiently shown that Section 198 of the Constitution and the laws of Kentucky, upon which those prosecutions are based, are not violative of any section of the Federal Constitution, and we now wish to make some comments upon the brief of plaintiff in error, and we approach this subject with some hesitancy, not because the deductions from the facts stated are conclusive, or the law quoted convincing, but (with all respect for learned counsel who prepared brief) truth and error, facts and fancy, are so inextricably commingled that it is with great difficulty the wheat can be separated from the chaff.

Indeed, it would appear the main authorities of plaintiff in error are the dissenting opinion of the Court of Appeals in case of International Harvester Company of America vs. Commonwealth, 131 Kentucky, and part of the message of Governor Willson of Kentucky to the General Assembly of that State of date January 7, 1908, and Encyclopaedia Britannica, 11th Ed., Vol 15, page 741c.

As to the dissenting opinion, it is sufficient to say that since the time of its delivery numerous cases bearing upon the question therein discussed have been decided by the Court of Appeals of Kentucky, and the judges who delivered the dissenting opinion were members of that court at the time the subsequent opinions were delivered, and the record shows the opinions were by a unanimous court, and all those subsequent opinions sustained the position taken by the majority of the

court in the case in which the dissenting opinion was delivered.

As to the message of Governor Willson, it may be said that his construction of the law, as indicated in that portion of his message (found on page 54 of brief of plaintiff in error) which is italicized in brief, has been expressly repudiated by every opinion of the Court of Appeals of Kentucky upon the subject, and this is not surprising.

As to the other statements of his message quoted in brief, many are incorrect, some magnified, and it may not be improper to say that in 1910, after the troubles arising from the tobacco agitation had subsided, a Committee of the Senate of Kentucky was appointed to investigate this trouble, among other matters, and on February 21, 1910, it filed its report, which report was unanimously adopted by the Senate of Kentucky, composed of men of all parties. In the report this statement was made:

> "That there were some violent and outrageous outbreaks against the law in certain counties in this State during the so-called "Night-Rider troubles, is a matter of history. It is equally true that a number of those outrages were magnified and some were invented and the good name and fame of the State was brought into disgrace partly by the actual outrages committed and partly by the conduct of the Governor in sending into various counties of the State, militia subject to no orders but his own, upon mere rumor and hearsay. This Committee has no sympathy whatever with violators of law. It believes that those men who were guilty of injuring persons or destroying property should be prosecuted and punished as their crimes deserve."

And the Governor referred to was Governor Willson.

As a matter of fact, the so-called Night-Rider troubles in Kentucky were confined to a few counties, and an overwhelming majority of the good citizens of the State were violently opposed to the course pursued by those so-called Night-Riders, and the Legislature of Kentucky did not pass any law (as might be inferred from brief of plaintiff in error) in deference to the wishes of the Night-Riders, but the laws upon which those prosecutions were based were passed solely to enable the manufacturer and the agriculturist to stand upon the same footing before the law.

As to the quotation of Encyclopaedia Britannica, we can only say here that many of the statements contained therein are untrue, and the article from which the quotation is taken was evidently prepared by someone who was either a partisan of the American Tobacco Company or ignorant of the facts about which he attempted to write. We cannot in this brief analyze this statement and point out its inaccuracies.

In discussing brief of plaintiff in error, we wish to call attention to this statement on page 16 thereof:

> "To sum up the matter briefly, it may be fairly stated that, according to the opinions of the Court of Appeals of Kentucky, it is now the law in that state that no combination is unlawful in and of itself; that neither individuals nor corporations can be punished for entering into a combination to fix prices or limit output; that the entering into a combination by an individual or a corporation is an element in an offense which is committed if and when such combination shall sell its product or commodity at a price greater or less than its 'real value;' and that it is for a jury to determine, under the rules laid down by the Court of Appeals."

From this statement it would be inferred that the purpose and intent of the Kentucky Constitution and

laws are to punish any person or persons who entered into a combination for the purpose of selling its product or commodity at a price greater *or less* than its real value. Such is not the law nor the intention of the law.

Section 198 of the Constitution provides that:

> "It shall be the duty of the General Assembly * * * to enact such laws as may be necessary to prevent all * * * combinations * * * from combining to depreciate below its real value any article, or to enhance the cost of any article above its real value."

The evident meaning of this section is that the General Assembly is authorized to pass such laws as will prevent combinations for the purpose of depreciating any article below its real value for the purpose of *buying* same and to enhance the value of any article for the purpose of *selling* same. And all of the decisions of the Court of Appeals show that this is the intention of the law.

The conditions which caused the act of 1906 to be amended are clearly shown in Commonwealth vs. Hodges, 137 Ky., and quoted on page 52 of brief for plaintiff in error. It is almost impossible to conceive of a case where a combination would be formed, the purpose of which was to enable the combination to sell articles below their real value. Every combination formed is for one of three purposes: (1) To establish a fixed and settled price for an article. (2) Or to enable the owner of the article to sell it at a higher price. (3) Or to enable one desiring to purchase an article to purchase it at a lower price. It is true combinations are sometimes formed, and the articles controlled by the combinations are sold at a lower price than before, but as a rule, this is for the purpose of crushing out competition in order to later raise the price, the ultimate purpose of the combination being to increase the price of the article.

The sole purpose of the Kentucky laws, as shown by repeated decisions of its court of last resort, and which are quoted in this brief and in brief of plaintiff in error, is to place all parties upon the same footing. Those laws say to the manufacturer: You may enter into a combination to fix and regulate the price of your manufactured articles. You may increase the price of those articles, but you cannot enter into a combination having for its purpose, and carrying that purpose into execution, to increase the price of the article you have to sell above its real value.

And they say to the purchaser of raw product: You can enter into a combination for the purpose of fixing and regulating the price of the product you wish to buy, but you cannot enter into a combination for the purpose, and carry it into execution, to depreciate the price of the raw product you wish to purchase below its real value.

These same laws say to the farmers of the State: You may enter into a combination for the purpose of fixing and regulating the price of your agricultural products, but you cannot enter into a combination the purpose of which is, and carry it into execution, to increase the price of your agricultural products above their real value. And they say to the farmers of the State: You may enter into a combination to fix and regulate the prices of the manufactured articles you need in carrying on your business, but you cannot enter into a combination, and carry it into execution, the purpose of which is to depreciate below their real value the articles which you wish to buy in the conduct of your business.

The same prohibition applies to all. The same privileges are given to all. All have the protection of equal laws. There is no possibility of construing the laws of Kentucky in any other manner than as above indicated, and there is not in an opinion of the Court of Appeals,

construing those laws, the slightest intimation that a different rule is applicable.

It is insisted in brief of plaintiff in error that the trial court in its instructions to the jury placed a construction on the Kentucky Anti-trust Law which conflicts with the Fourteenth Amendment, and one of the errors relied upon to reverse this case is as follows:

> "The construction put upon the anti-trust laws by the trial court, in limiting the defense for increasing prices, *solely* to the increased labor and material costs, and eliminating the effect of improvements upon the 'real value' of the machines, deprived defendant of property without the due process and the equal protection of the laws guaranteed by the Fourteenth Amendment." (Brief of Plaintiff in error, page 20.)

On pages 19 and 20 of brief of plaintiff in error the following statement is made:

> "Therefore in these three cases (referring to the cases at bar) the Kentucky Court of Appeals has held that it was lawful in Kentucky for plaintiff in error to enter into a combination for the purpose of enhancing the price of its commodities; but that if, having entered into a combination, its commodities sold in Kentucky at a price greater than that at which similar merchandise was sold before the combination was formed, and no substantial changes in market conditions were shown, this would sustain a finding of guilt for selling the articles above their 'real value,' *unless* the cost thereof had been in the meantime increased *solely* by an increase in the cost of materials or labor."

The error relied on and the above quotation are based upon the following instruction given by the trial court:

"Although you may believe from the evidence to the exclusion of a reasonable doubt that the defendant entered into or became a member of a pool, trust or combine * * * and that in twelve months before July 21, 1911, the defendant while a member of such pool, trust or combine, sold some of the farming or harvesting implements or machinery mentioned in instruction No. 1, in Bullitt County, either itself or through its agents at a greater price than said machinery sold at before defendant became a member of such pool, trust, or combine, yet, if you believe from the evidence that the enhancement of the price of said machinery was due solely to the increased cost of labor or material, if any, in producing said machinery, you should find the defendant not guilty."

The Court was asked and refused to give the following instruction:

"In determining the real value of the machines sold by the defendant the jury should consider the improved conditions of the machines, if they believe from the evidence such improvements enhanced its (their) real value."

We contend that if there was any error in giving or refusing the above instructions (which we deny), that error cannot be considered by this Court, for the reason that the giving or refusing of said instructions was not relied upon in the trial court or in the Court of Appeals of Kentucky as violative of any section of the Federal Constitution or of any Federal law. The objections made in the trial court by defendant (plaintiff in error) are as follows:

"The defendant, International Harvester Company of America demurs to the petition on information herein because the same does not state facts sufficient to constitute a cause of action against it or

an offense against the laws of the State of Kentucky.

"Not waiving the grounds of demurrer but expressly insisting thereon the defendant assign as one ground of its demurrer herein that the act of May 20th, 1890, being Chapter 101 Kentucky Statutes under which this proceeding or prosecution is instituted as set forth in the petition filed herein, must be taken, considered and read in connection with the act approved March 21st, 1906, entitled 'An Act permitting persons to combine or pool their crops of wheat, tobacco and other products and sell the same as a whole and making contracts in pursuance thereof valid' and when read, taken, or construed in connection with said act of March 21st, 1906, the said act of May 20th, 1890, denies to it and to other persons within the State of Kentucky the equal protection of the law and is in violation of the Fourteenth Amendment of the Constitution of the United States and is void.

"And this defendant assigns as further ground of demurrer herein that the said act of May 20th, 1890, as construed by the Court of Appeals of Kentucky fails to provide or establish any fixed standard or criterion by which to determine what was or is the real value of the articles and machinery herein alleged to have been sold by the defendant and is in violation of the said Fourteenth amendment of the Constitution of the United States in that it permits this defendant and other persons and corporations within this State to be deprived of their property without due process of law and is void."

It will be noticed that the Federal questions raised by this demurrer go only to the sufficiency of the petition, and the failure to provide any fixed standard to determine the real value of the article. While objections and exceptions were taken to the instructions upon the trial of the case, these objections and exceptions related to the ruling of the court upon State law, and nowhere did those objections and exceptions rely upon the Federal Constitution or Federal laws.

Therefore, the only questions which this Court can consider are: Do the acts of May 20, 1890, and the act of March 21, 1906, deny to plaintiff in error the equal protection of the law, and does the act of May 20, 1890, fail to establish any fixed standard to determine the real value of the article sold. As we understand it, the only questions that this Court can consider are Federal questions and those questions must be relied upon and pointed out in the trial court, and must have been passed upon by the court of last resort adversely to the contention that the act complained of violated the Federal Constitution.

In this case no question was raised in the Court of Appeals as to any violation of the Federal Constitution in the giving or refusing of instructions under consideration. There is nowhere the slightest intimation in the demurrer that the trial of the case by the trial court was in any manner violative of the Fourteenth Amendment of the Constitution, except and in so far that the court held the petition was sufficient, and it is fair to presume that if the defendant (plaintiff in error) relied only upon the insufficiency of the petition upon the trial of the case and in the Court of Appeals, that it did not consider the question as to instructions in any manner involving a Federal question and did not rely upon such question as affecting those instructions.

In Dewey vs. Des Moines, 173 U. S., page 199, this Court uses the following language:

> "In all these cases it did appear from the record that the rights were set up or claimed in such a way as to bring the subject to the attention of the State court. It is not enough that there may be somewhere hidden in the record a question which, if raised, would be of a Federal nature. (Hamilton Mfg. Company v. Massachusetts, 6 Wall. 632. (18: 901). In order to be available in this court some claim or right must have been asserted in the court

below by which it would appear that the party asserting the right founded it in some degree upon the Constitution or laws or treaties of the United States. In such case, if the court below denied the right claimed, it would be enough. But, the denial, whether express or implied, must be of some right or claim founded upon the Constitution or the laws or treaties of the United States, which had in some manner been brought to the attention of the court below. The record shows nothing of the kind in this case."

In Bolln vs. Nebraska, 176 U. S., 90, the plaintiff in error complained in this Court that he was denied a right of trial by jury. Upon the question whether he had waived a preliminary examination before the magistrate and in this he was deprived of his liberty without due process of law in contravention of the Fourteenth Amendment, this Court, in discussing the question, on page 90 of opinion, says:

"But without expressing a decided opinion upon this point we are confronted by another difficulty in the fact that it is nowhere alleged in the record that a denial to the defendant of a jury trial of this issue was violative of the Constitution of the United States. It is true that in the fourth paragraph of the plea in abatement it is said that 'this paragraph is in the contravention' of the Fourteenth Amendment, but this evidently refers to the prior paragraphs which deal only with a prosecution by indictment. In the opinion of the court discussing this question no allusion is made to the denial of this jury trial being in conflict with the Fourteenth Amendment, and it is only in the assignments of error, filed in the Supreme Court of the State four months after its judgment of affirmance, that the defendant sets it up as a denial of a federal right. Indeed, it nowhere appears in the record or in the opinion of the Supreme Court, that the denial of a jury trial of this issue was claimed to be in contravention even of the State Constitution. The question is discussed by the

court as one of general law and it is only the prosecution by information that the court discusses as a constitutional question. * * *

"We have repeatedly decided that an appeal to the jurisdiction of this court must not be a mere afterthought, and that if any right, privilege or immunity is asserted under the Constitution or laws of the United States it must be specially set up and claimed before the final adjudication of the case in the court from which the appeal is sought to be maintained. It is true that this court has sometimes held that if a federal question appeared in the record and was decided, or such decision was necessarily involved in the case, and that such case could not have been determined without deciding such question, the fact that it was not specially set up and claimed is not conclusive against a review here; but such cases have usually, if not always, arisen under the first or second clause of section 709 and have involved the validity of a treaty, statute or authority exercised under the United States, or the validity of a statute or authority exercised under a state where such statute or authority is alleged to be repugnant to the Constitution or the laws of the United States."

Without waiving the question of the right of this Court to pass upon those instructions, the plaintiff in error was deprived of no right by the giving of the instructions complained of and the refusal to give the instructions offered by it. The record of the testimony upon the trial of the case discloses the fact that all of the testimony offered by defendant (plaintiff in error) upon the question of the increased efficiency of its machine since the combination, was permitted to go to the jury, as was the testimony of the Commonwealth, and shows that there was no increased efficiency. Therefore, the jury had before it, as competent testimony, all of the evidence offered by either side upon this question, and it had a right to consider this testimony in reaching a

verdict. If the testimony upon this subject offered by defendant (plaintiff in error) had been refused by the lower court, then there might be more force in its contention. The Court of Appeals, in deciding the case, says:

> "The evidence upon the question of increased efficiency all went to the jury and was considered by them with other evidence in the case."

And again that court says:

> "Appellant also makes complaint of the trial court's refusal to give the following instruction offered by it:
>
> 'In determining the real value of the machines sold by the defendant, the jury should consider the improved condition of the machines, if they believe from the evidence such improvement enhanced its real value.'
>
> "We do not think the refusal of this instruction was error * * * the ground of defense, with respect to which it sought to advise the jury, was in substance and meaning sufficiently presented by the instruction given."

Now let us turn to the instructions given by the court: In instruction No. 1 the court says:

> "If the jury believe from the evidence to the exclusion of a reasonable doubt, that the defendant entered into * * * an agreement * * * with the McCormick Harvester Company * * * for the purpose of regulating * * * the price of harvesting and farm machinery * * * and the effect of said * * * agreement * * * if any was to enhance the price of said harvesting or farm machinery * * * above their real value, and if the jury further believe from the evidence, beyond a reasonable doubt, that the defendant company in pursuance of * * * such agreement in Bullitt County within one year * * * before July 21, 1911, * * * sold any harvest-

ing or farm machinery * * * at more than their real value * * * the jury should find the defendant guilty."—(Transcript of Bullitt County Record, page 25).

Now, from this instruction the jury must believe beyond a reasonable doubt, from *all* the evidence, the defendants sold the machinery above its real value, and as the evidence concerning the increased efficiency of the machine was permitted to go to the jury, under this instruction they were required to consider that evidence.

Further, instruction No. 2 given by the court does not mean what plaintiff in error contends it means. It does not limit the jury solely to the increased cost of labor and material used in producing the machine as a justification for the increased price. It does not say that unless the cost of the machine had been increased solely by an increase in the cost of material or labor they should find the defendant guilty.

The first instruction given requires the jury to consider all the evidence introduced by either side. The second instruction simply provides that if the jury believe the increased price, if any, was occasioned solely by the increased cost of labor and material, they should find for the defendant, but it does not say, directly or indirectly, that *unless* they believe the increased cost, if any, was occasioned by the increased price of labor and material, they should find the defendant guilty. Under that instruction, the jury, if it came to the conclusion that the increased price of labor and material *solely* did not justify the increased price of the machines, then they had a right to consider whether any other elements, concerning which testimony was offered, justified the increase in the price of the machines.

Instructions must be considered as a whole, and when so considered, there can be no doubt that the jury had a right to consider the increased efficiency in deter-

mining the price of the machine. Further, such increased efficiency was not such an element of value as would authorize or justify this Court in reversing this case because of the failure to give the instructions offered by defendant (plaintiff in error) or in the giving of the instruction complained of.

It is insisted by plaintiff in error that:

> "As construed, the law of Kentucky denies equal protection, because, in the case of farmers, the combination is judicially presumed not to seek any enhancement of the price above the real value * * *
>
> "Whereas, in the case of manufacturers and dealers, including plaintiff in error, the legal presumption indulged was that any increase in price following a combination is an increase above the real value."—(Pages 28-29, Brief of plaintiff in error.)

There is not a line of any opinion of the Court of Appeals of Kentucky upon the questions here involved that justifies the first statement. All that the court has decided is that "a pool formed for the express purpose of enhancing the price of farm products would be presumed in the absence of evidence, not to seek an enhancement above its real value." (Tobacco Society vs. Brumbach, 128 Ky., 137. Brief of plaintiff in error, page 58.)

In International Harvester Company vs. Commonwealth, 144 Ky., 403, brief of plaintiff in error, pages 60-61, it is said that where a combination has been formed and immediately after the combination there was an increase in the price of the machine, *and that the market conditions were normal both before and after the combination*, that proof of those facts "are sufficient to create the legal presumption that the increase in the price of the machines was an increase above their real value."

The court nowhere holds with reference to agricultural products, that if a combination was formed to fix the price of such products and immediately after the combination the price was increased, and that the market conditions were normal both before and after the combination, that proof of those facts would *not* be sufficient to create the legal presumption that the increase in the price of the machines was an increase above their real value.

Plaintiff in error takes certain portions of different opinions, delivered on different states of facts, and from them endeavors to deduce rules favorable to one party and unfavorable to the other, which rules were not in contemplation of the court when the opinions were delivered and which are not justified by any decision of the court.

THE KENTUCKY ANTI-TRUST STATUTES, AS CONSTRUED BY THE COURT OF APPEALS, ARE NOT SO INDEFINITE AS TO RENDER THEM VOID AS CRIMINAL LAWS.

Plaintiff in error, from page 38 to page 48, inclusive of its brief, devotes itself to the proposition that the trust statutes of Kentucky are so indefinite as to render them void as criminal laws. We think this proposition has been answered clearly and fully by the Court of Appeals in its various opinions heretofore quoted in this brief, but we wish to discuss this question a little further.

On page 46 of brief of plaintiff in erorr it is said:

> "The jury was compelled to guess how much or how little the lessening of competition caused by the consolidation of several competing harvester plants in 1902 tended to produce the prices existing in 1910 and 1911."

Again on page 47 it is said:

> "A person's guilt or innocence is thus made to turn upon the existence of something that cannot be proved by evidence; namely, what would be the market value of certain commodities under other conditions than those that actually exist. This is something that cannot be known. Therefore, it is something that can not be proved."

Again on the same page:

> "How can it be proved what binders, mowers, and rakes would have sold for in Bullitt or Grayson or Todd counties, Kentucky, in 1911, if the International Harvester Company had not been organized?
>
> "It was obviously as impossible to prove what the market value of those machines would have been under other conditions as to prove what it will be five years hence."

If the contention of plaintiff in error is correct, it results in this, that combinations may be formed for the purpose of increasing the price of articles above their real value and this purpose may be carried out by actually selling the articles at a price above their real value, and if prosecuted for this offense, which was an offense under the common law, the defense is, "you cannot prove what the real or market value would be if this combination had not been formed, therefore, while we may be guilty, you have no means of proving it, and we cannot be punished for this act, however wrong it may be in law or morals."

To us the difficulty suggested is one of easy solution, and that solution is the one adopted by the laws of Kentucky, that is to hold the real value or market price is the price the article sold for under normal conditions before any combination, then if the combination is formed to control the manufacture and sale of those articles,

which combination necessarily results in a fixing of the prices of the articles because the sale could not be controlled and regulated without fixing the price, and if the prices so fixed are in excess of the selling prices of the articles before the combination was formed, and taking into consideration the increase, if any, in labor and material, or, of you please, the increase, if any, in the value of the article by reason of its increased efficiency, and if upon the testimony heard upon those questions and upon further testimony that the business conditions generally are the same at the time the offense is said to have been committed as they were before the combination was formed, the jury have a right to conclude that if the increased price is greater than the increased value of labor and material and the increased value of the machine by reason of its increased efficiency, then the articles are sold above their real or market value, because the market value of an article, under normal conditions, is determined by the cost of its production and sale and a reasonable profit upon the money invested. To illustrate, if an article was sold upon an open market, when business conditions were as usual, in 1902 at $20.00, and a combination was formed to control the output of that article, and immediately after control was taken the price of the article was increased, and during a period of eight or nine years the price should increase several times, so that the price in 1911 was $40.00, and during this period, by reason of the combination, there was a lessening of expenses in marketing the article amounting to $2.00 on each article, and the increased cost of labor on each article was $4.00, the increased cost of material in each article was $4.00, and the article by reason of its efficiency increased in value $4.00, and in 1911 the business conditions were exactly the same as before the combination, then would it not be reasonable to suppose, and in fact could any other conclusion be drawn,

than the difference in the prices between the machines sold before the combination and the difference in the prices of the machine in 1911, after the combination, deducting $8.00 for increase in price of labor and $4.00 for increased value of the article by reason of its efficiency, and credit this amount by $2.00, a lessening of the expenses of the sale of each article, which amounts to $10.00, and which ought to make the total cost of the article $30.00, that the extra $10.00 upon each article is that much charged in excess of the market value of the article. You must determine the market value by the conditions which it can be reasonably shown would have existed if the combination had not been formed.

THE STATUTES, AS CONSTRUED AND ENFORCED, DO NOT DENY THE EQUAL PROTECTION OF THE LAW.

We do not consider it necessary to further comment upon this phase of the case, except to call the attention of the court to certain cases referred to by plaintiff in error in that portion of its paragraph devoted to this subject, which will be found on pages 62 to 68, inclusive.

The case of Ex parte Virginia, 100 U. S., 339, has no application to the questions here involved.

The case of Yick Wo v. Hopkins, 118 U. S., 356, is not in point. In the Yick Wo case it appears that by an ordinance of the Board of Supervisors of the county in which the city of San Francisco, California, is situated, it was provided, that it should be unlawful for any person to carry on a laundry within the corporate limits of the city and county of San Francisco, without having first obtained consent of the Board of Supervisors, except the same be located in a brick or stone building.

It appears from the admitted facts of the record that Yick Wo was a native of China, and had been engaged in the laundry business in the same premises and building for twenty-two years. That he had complied with all the necessary regulations both as to the sanitary conditions of his premises and protection against fire. That in various other places similarly conducted and which were operated by Chinamen the right to conduct a laundry business had been refused; while those who were conducting a similar business, who were not Chinamen were under the same conditions permitted to continue their business. The court held this was a discrimination against the Chinese, which was prohibited by the Fourteenth Amendment to the Constitution of the United States.

In the case at bar it is shown that plaintiff in error violated a general law, which applied to all persons, without any discretion being vested in any officer to limit or restrain the law.

There is not a line of proof in the record showing that plaintiff in error has been discriminated against. There is not a line of proof in the record which shows that any other person, individual or corporation has been permitted to violate the law for which plaintiff in error has been prosecuted, without being prosecuted.

The case of Louisville & Nashville Railroad Company v. Central Stock Yards Company, 212 United States, 133, is relied upon by plaintiff in error to sustain its proposition that the law itself must save the rights of parties and they cannot be left to the discretion of the courts.

In the railroad case there was inserted in the judgment a provision providing for the proper compensation to the railroad company for the use of its cars in switching upon the track of another corporation. The law of Kentucky did not provide for such compensation and in

so providing the judge of the trial court exercised his discretion. This court in that case held that the law itself should save the parties' right and it should not be left alone to the discretion of the court. What application that case has to the cases at bar, we are unable to see.

The Statutes of Kentucky, as construed by its court of last resort, becomes the law by which the rights of all parties are governed and in the enforcement of that law no discretion is left to any judge or court.

Upon the records in the cases at bar, we believe the judgment of the Court of Appeals should be sustained and ask an affirmance in each case.

Respectfully submitted,

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